IN THE SUPREME COURT OF INDIA

WRIT PETITION (CIVIL) NO. 37 OF 2015

Mathew Thomas ...Petitioner

Versus

Union of India & Ors ... Respondents

COMPILATION

SUBMITTED BY GOPAL SUBRAMANIUM

SENIOR ADVOCATE

374 U.S. 203

SCHOOL DISTRICT OF ABINGTON TOWNSHIP, PENNSYLVANIA, et al., Appellants,

v.

Edward Lewis SCHEMPP et al.

William J. MURRAY III, etc., et al., Petitioners,

v.

John N. CURLETT, President, et al., Individually, and Constituting the Board of School Commissioners of Baltimore City.

Nos. 142 and 119.

Argued Feb. 27 and 28, 1963.

Decided June 17, 1963.

Two companion cases presenting issues in the context of state action requiring that schools begin each day with readings from the Bible. In one case, No. 142, an action by parents to enjoin enforcement of a Pennsylvania statute providing for Bible reading in public schools, the United States District Court for the Eastern District of Pennsylvania, 201 F.Supp. 815, rendered judgment for the plaintiffs and a direct appeal was taken. In the other action, No. 119, a Maryland mandamus proceeding to compel a school board to rescind a rule providing for opening exercises in public schools embracing reading of the Bible or recitation of the Lord's Prayer, the Superior Court of Baltimore City, Maryland, rendered judgment for defendants, and plaintiffs appealed. The Court of Appeals of Maryland, 228 Md. 239, 179 A.2d 698, affirmed. Certiorari was granted. The Supreme Court, Mr. Justice Clark, held that the practices at issue and the laws requiring them were unconstitutional under the Establishment Clause, as applied to the states under the Fourteenth Amendment.

Judgment in No. 142 affirmed; judgment in No. 119 reversed and cause remanded with directions.

Mr. Justice Stewart dissented.

1. Constitutional Law ⇐274

The First Amendment's mandate that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof has been made wholly applicable to the states by the Fourteenth Amendment. U.S. C.A.Const. Amends. 1, 14.

2. Constitutional Law ⇐84

The Establishment Clause of the First Amendment is not restricted to forbidding governmental preference of one religion over another. U.S.C.A. Const. Amend. 1.

3. Constitutional Law ⇐274

The Establishment Clause of the First Amendment prohibits a fusion of governmental and religious functions or a concert or dependency of one upon the other to the end that official support of the state and federal government would be placed behind tenets of one or all orthodoxies. U.S.C.A.Const. Amends. 1, 14.

4. Constitutional Law ⇐274

The Establishment Clause of the First Amendment withdrew all legislative power respecting religious belief or expression thereof. U.S.C.A.Const. Amends. 1, 14.

5. Constitutional Law ⇐274

Test under Establishment Clause of the First Amendment is as to purpose and primary effect of enactment, and if either is advancement or inhibition of religion, enactment exceeds scope of legislative power. U.S.C.A.Const. Amends. 1, 14.

6. Constitutional Law ⇐274

To withstand the strictures of the Establishment Clause of the First Amendment there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion. U.S.C.A.Const. Amends. 1, 14.

7. Constitutional Law ⇐274

The Free Exercise Clause of the First Amendment like the Establishment Clause withdraws from legislative power,

state and federal, the exertion of any restraint on free exercise of religion. U.S.C.A.Const. Amends. 1, 14.

8. Constitutional Law ⇐274

Purpose of the Free Exercise Clause of the First Amendment is to secure religious liberty in the individual by prohibiting any invasion thereof by civil authority. U.S.C.A.Const. Amends. 1, 14.

9. Constitutional Law ⇐274

It is necessary in case under Free Exercise Clause of First Amendment for one to show coercive effect of enactment as it operates against him in practice of religion and violation of Free Exercise Clause is predicated on coercion, while Establishment Clause violation need not be so attended. U.S.C.A. Const. Amends. 1, 14.

10. Constitutional Law ⇐274

Practices of selection and reading of verses of Bible and recitation, by students in unison, of Lord's Prayer, at opening of school day, as part of curricular activities of students required by law to attend school, were religious in character and they and the laws requiring them were unconstitutional under the Establishment Clause of the First Amendment as applied to the states through the Fourteenth Amendment. U.S.C.A.Const. Amends. 1, 14; 24 P.S.Pa. §§ 11–1122, 15–1516; Code Md.1957, art. 77, § 202.

11. Pleading ⇐214(3)

Demurrer to petition alleging that uniform practice in schools under respondents' rule had been to read from King James version of Bible and that exercise was sectarian admitted religious character of exercises.

12. Constitutional Law ⇐42

Constitutionality of laws and practices relating to religious exercises in schools could be challenged only by persons having standing to complain. U.S. C.A.Const. Amends. 1, 14.

13. Constitutional Law ⇐42

Requirements for standing to challenge state action under Establishment Clause of First Amendment, unlike those relating to Free Exercise Clause, do not include proof that particular religious freedoms are infringed. U.S.C.A.Const. Amends. 1, 14.

14. Constitutional Law ⇐42

School children and their parents, directly affected by laws and practices relating to religious exercises in schools against which their complaints were directed, had standing to complain of the practices as unconstitutional under the Establishment Clause. U.S.C.A.Const. Amends. 1, 14; 24 P.S.Pa. §§ 11–1122, 15–1516; Code Md.1957, art. 77, § 202.

15. Constitutional Law ⇐274

The fact that individual students could absent themselves from religious exercises in schools upon parental request furnished no defense to claim of unconstitutionality under the Establishment Clause. U.S.C.A.Const. Amends. 1, 14; 24 P.S.Pa. §§ 11–1122, 15–1516; Code Md.1957, art. 77, § 202.

16. Constitutional Law ⇐274

It was no defense to urge that religious practices in schools might be relatively minor encroachment upon First Amendment. U.S.C.A.Const. Amends. 1, 14.

17. Constitutional Law ⇐274

State may not establish a religion of secularism in sense of affirmatively opposing or showing hostility to religion and thus preferring those who believe in no religion over those who do believe. U.S.C.A.Const. Amends. 1, 14.

18. Constitutional Law ⇐274

Study of the Bible for its literary and historic qualities and study of religion, when presented objectively as part of secular program of education, may be effected consistent with the First Amendment. U.S.C.A.Const. Amends. 1, 14.

19. Constitutional Law ⇐274

The concept of neutrality which does not permit state to require religious exercise even with consent of majority of those affected does not collide with the majority's right to free exercise of religion. U.S.C.A.Const. Amends. 1, 14.

20. Constitutional Law ⇐274

While Free Exercise Clause of First Amendment clearly prohibits use of state action to deny rights of free exercise to anyone, it does not mean that majority may use machinery of state to practice its beliefs. U.S.C.A.Const. Amends. 1, 14.

21. Constitutional Law ⇐274

In the relationship between man and religion, state is firmly committed to a position of neutrality and it is not within power of government to invade citadel of individual heart and mind whether its purpose or effect be to aid or oppose, to advance or retard. U.S.C.A.Const. Amends. 1, 14.

No. 142.

Philip H. Ward III, Philadelphia, Pa., and John D. Killian, III, Harrisburg, Pa., for appellants.

Henry W. Sawyer III, Philadelphia, Pa., for appellees.

No. 119.

Leonard J. Kerpelman, Baltimore, Md., for petitioners.

Francis B. Burch and George W. Baker, Jr., Baltimore, Md., for respondents.

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Thomas B. Finan, Baltimore, Md., for State of Maryland, as amicus curiae.

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Mr. Justice CLARK delivered the opinion of the Court.

Once again we are called upon to consider the scope of the provision of the First Amendment to the United States Constitution which declares that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * *." These companion cases present the issues in the context of state action requiring that schools begin each day with readings from the Bible. While raising the basic questions under slightly different factual situations, the cases permit of joint treatment. In light of the history of the First Amendment and of our cases interpreting and applying its requirements, we hold that the practices at issue and the laws requiring them are unconstitutional under the Establishment Clause, as applied to the States through the Fourteenth Amendment.

I.

The Facts in Each Case: No. 142. The Commonwealth of Pennsylvania by law, 24 Pa.Stat. § 15–1516, as amended, Pub.Law 1928 (Supp.1960) Dec. 17, 1959, requires that "At least ten verses from the Holy Bible shall be read, without comment, at the opening of each public school on each school day. Any child shall be excused from such Bible reading, or attending such Bible reading, upon the written request of his parent or guardian." The Schempp family, husband and wife and two of their three children, brought suit to enjoin enforcement of the statute, contending that their rights under the Fourteenth Amendment to the Constitution of the United States are, have been, and will continue to be violated unless this statute be declared unconstitutional as violative of these provisions of the First Amendment. They sought to enjoin the appellant school district, wherein the Schempp children attend school, and its officers and the

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Superintendent of Public Instruction of the Commonwealth from continuing to conduct such readings and recitation of the Lord's Prayer in the public schools of the district pursuant to the statute. A three-judge statutory District Court for the Eastern District of Pennsylvania held that the statute is violative of the Establishment Clause of the First Amendment as ap-

plied to the States by the Due Process Clause of the Fourteenth Amendment and directed that appropriate injunctive relief issue. D.C., 201 F.Supp. 815.[1] On appeal by the District, its officials and the Superintendent, under 28 U.S.C. § 1253, we noted probable jurisdiction. 371 U.S. 807, 83 S.Ct. 25, 9 L.Ed.2d 52.

The appellees Edward Lewis Schempp, his wife Sidney, and their children, Roger and Donna, are of the Unitarian faith and are members of the Unitarian Church in Germantown, Philadelphia, Pennsylvania, where they, as well as another son, Ellory, regularly attend religious services. The latter was originally a party but having graduated from the school system *pendente lite* was voluntarily dismissed from the action. The other children attend the Abington Senior High School, which is a public school operated by appellant district.

On each school day at the Abington Senior High School between 8:15 and 8:30 a. m., while the pupils are attending their home rooms or advisory sections, opening exercises

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are conducted pursuant to the statute. The exercises are broadcast into each room in the school building through an intercommunications system and are conducted under the supervision of a teacher by students attending the school's radio and television workshop. Selected students from this course gather each morning in the school's workshop studio for the exercises, which include readings by one of the students of 10 verses of the Holy Bible, broadcast to each room in the building. This is followed by the recitation of the Lord's Prayer, likewise over the intercommunications system, but also by the students in the various classrooms, who are asked to stand and join in repeating the prayer in unison. The exercises are closed with the flag salute and such pertinent announcements as are of interest to the students. Participation in the opening exercises, as directed by the statute, is voluntary. The student reading the verses from the Bible may select the passages and read from any version he chooses, although the only copies furnished by the school are the King James version, copies of which were circulated to each teacher by the school district. During the period in which the exercises have been conducted the King James, the Douay and the Revised Standard versions of the Bible have been used, as well as the Jewish Holy Scriptures. There are no prefatory statements, no questions asked or solicited, no comments or explanations made and no interpretations given at or during the exercises. The students and parents are advised that the student may absent himself from the classroom or, should he elect to remain, not participate in the exercises.

It appears from the record that in schools not having an intercommunications system the Bible reading and the recitation of the Lord's Prayer were conducted by the

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home-room teacher,[2] who chose the text of the verses and read them herself or had students read them in rotation or by volunteers. This

1. The action was brought in 1958, prior to the 1959 amendment of § 15–1516 authorizing a child's nonattendance at the exercises upon parental request. The three-judge court held the statute and the practices complained of unconstitutional under both the Establishment Clause and the Free Exercise Clause. D.C., 177 F. Supp. 398. Pending appeal to this Court by the school district, the statute was so amended, and we vacated the judgment and remanded for further proceedings. 364 U.S. 298, 81 S.Ct. 268, 5 L.Ed.2d 89. The same three-judge court granted appellees' motion to amend the pleadings, D.C., 195 F.Supp. 518, held a hearing on the amended pleadings and rendered the judgment, D.C., 201 F.Supp. 815, from which appeal is now taken.

2. The statute as amended imposes no penalty upon a teacher refusing to obey its mandate. However, it remains to be seen whether one refusing could have his contract of employment terminated for "wilful violation of the school laws." 24 Pa. Stat. (Supp.1960) § 11–1122.

was followed by a standing recitation of the Lord's Prayer, together with the Pledge of Allegiance to the Flag by the class in unison and a closing announcement of routine school items of interest.

At the first trial Edward Schempp and the children testified as to specific religious doctrines purveyed by a literal reading of the Bible "which were contrary to the religious beliefs which they held and to their familial teaching." 177 F.Supp. 398, 400. The children testified that all of the doctrines to which they referred were read to them at various times as part of the exercises. Edward Schempp testified at the second trial that he had considered having Roger and Donna excused from attendance at the exercises but decided against it for several reasons, including his belief that the children's relationships with their teachers and classmates would be adversely affected.[3]

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Expert testimony was introduced by both appellants and appellees at the first trial, which testimony was summarized by the trial court as follows:

"Dr. Solomon Grayzel testified that there were marked differences between the Jewish Holy Scriptures and the Christian Holy Bible, the most obvious of which was the absence of the New Testament in the Jewish Holy Scriptures. Dr. Grayzel testified that portions of the New Testament were offensive to Jewish tradition and that, from the standpoint of Jewish faith, the concept of Jesus Christ as the Son of God was 'practically blasphemous'. He cited instances in the New Testament which, assertedly, were not only sectarian in nature but tended to bring the Jews into ridicule or scorn. Dr. Grayzel gave as his expert opinion that such material from the New Testament could be explained to Jewish children in such a way as to do no harm to them. But if portions of the New Testament were read without explanation, they could be, and in his specific experience with children Dr. Grayzel observed, had been, psychologically harmful to the child and had caused a divisive force within the social media of the school.

"Dr. Grayzel also testified that there was significant difference in attitude with regard to the respective Books of the Jewish and Christian Religions in that Judaism attaches no special significance to the reading of the Bible *per se* and that the Jewish Holy Scriptures are source materials to be studied. But Dr. Grayzel did state that many portions of the New,

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as well as of the Old, Testament contained passages of great literary and moral value.

3. The trial court summarized his testimony as follows:

"Edward Schempp, the children's father, testified that after careful consideration he had decided that he should not have Roger or Donna excused from attendance at these morning ceremonies. Among his reasons were the following. He said that he thought his children would be 'labeled as "odd balls"' before their teachers and classmates every school day; that children, like Roger's and Donna's classmates, were liable 'to lump all particular religious difference[s] or religious objections [together] as "atheism"' and that today the word 'atheism' is often connected with 'atheistic communism', and has 'very bad' connotations, such as 'un-American' or 'anti-Red', with overtones of possible immorality. Mr. Schempp pointed out that due to the events of the morning exercises following in rapid succession, the Bible reading, the Lord's Prayer, the Flag Salute, and the announcements, excusing his children from the Bible reading would mean that probably they would miss hearing the announcements so important to children. He testified also that if Roger and Donna were excused from Bible reading they would have to stand in the hall outside their 'homeroom' and that this carried with it the imputation of punishment for bad conduct." 201 F.Supp., at 818.

"Dr. Luther A. Weigle, an expert witness for the defense, testified in some detail as to the reasons for and the methods employed in developing the King James and the Revised Standard Versions of the Bible. On direct examination, Dr. Weigle stated that the Bible was non-sectarian. He later stated that the phrase 'non-sectarian' meant to him non-sectarian within the Christian faiths. Dr. Weigle stated that his definition of the Holy Bible would include the Jewish Holy Scriptures, but also stated that the 'Holy Bible' would not be complete without the New Testament. He stated that the New Testament 'conveyed the message of Christians.' In his opinion, reading of the Holy Scriptures to the exclution of the New Testament would be a sectarian practice. Dr. Weigle stated that the Bible was of great moral, historical and literary value. This is conceded by all the parties and is also the view of the court." 177 F.Supp. 398, 401–402.

The trial court, in striking down the practices and the statute requiring them, made specific findings of fact that the children's attendance at Abington Senior High School is compulsory and that the practice of reading 10 verses from the Bible is also compelled by law. It also found that:

"The reading of the verses, even without comment, possesses a devotional and religious character and constitutes in effect a religious observance. The devotional and religious nature of the morning exercises is made all the more apparent by the fact that the Bible reading is followed immediately by a recital in unison by the pupils of the Lord's Prayer. The fact that some pupils, or theoretically all pupils, might be excused from attendance at the exercises

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does not mitigate the obligatory nature of the ceremony for * * * Section 1516 * * * unequivocally requires the exercises to be held every school day in every school in the Commonwealth. The exercises are held in the school buildings and perforce are conducted by and under the authority of the local school authorities and during school sessions. Since the statute requires the reading of the 'Holy Bible', a Christian document, the practice * * * prefers the Christian religion. The record demonstrates that it was the intention of * * * the Commonwealth * * * to introduce a religious ceremony into the public schools of the Commonwealth." 201 F.Supp., at 819.

No. 119. In 1905 the Board of School Commissioners of Baltimore City adopted a rule pursuant to Art. 77, § 202 of the Annotated Code of Maryland. The rule provided for the holding of opening exercises in the schools of the city, consisting primarily of the "reading, without comment, of a chapter in the Holy Bible and/or the use of the Lord's Prayer." The petitioners, Mrs. Madalyn Murray and her son, William J. Murray III, are both professed atheists. Following unsuccessful attempts to have the respondent school board rescind the rule, this suit was filed for mandamus to compel its rescission and cancellation. It was alleged that William was a student in a public school of the city and Mrs. Murray, his mother, was a taxpayer therein; that it was the practice under the rule to have a reading on each school morning from the King James version of the Bible; that at petitioners' insistence the rule was amended [4] to permit children to

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be excused from the exercise on request of the parent and that William

The rule as amended provides as follows: "Opening Exercises. Each school, either collectively or in classes, shall be opened by the reading, without comment, of a chapter in the Holy Bible and/or the use of the Lord's Prayer. The Douay

had been excused pursuant thereto; that nevertheless the rule as amended was in violation of the petitioners' rights "to freedom of religion under the First and Fourteenth Amendments" and in violation of "the principle of separation between church and state, contained therein. * * *" The petition particularized the petitioners' atheistic beliefs and stated that the rule, as practiced, violated their rights

> "in that it threatens their religious liberty by placing a premium on belief as against non-belief and subjects their freedom of conscience to the rule of the majority; it pronounces belief in God as the source of all moral and spiritual values, equating these values with religious values, and thereby renders sinister, alien and suspect the beliefs and ideals of your Petitioners, promoting doubt and question of their morality, good citizenship and good faith."

The respondents demurred and the trial court, recognizing that the demurrer admitted all facts well pleaded, sustained it without leave to amend. The Maryland Court of Appeals affirmed, the majority of four justices holding the exercise not in violation of the First and Fourteenth Amendments, with three justices dissenting. 228 Md. 239, 179 A.2d 698. We granted certiorari. 371 U.S. 809, 83 S.Ct. 21, 9 L.Ed.2d 52.

II.

It is true that religion has been closely identified with our history and government. As we said in Engel v. Vitale, 370 U.S. 421, 434, 82 S.Ct. 1261, 1268, 8 L.Ed.2d 601 (1962), "The history of man is inseparable from the history of religion. And * * * since

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the beginning of that history many people have devoutly believed that 'More things are wrought by prayer than this world dreams of.'" In Zorach v. Clauson, 343 U.S. 306, 313, 72 S.Ct. 679, 684, 96 L.Ed. 954 (1952), we gave specific recognition to the proposition that "[w]e are a religious people whose institutions presuppose a Supreme Being." The fact that the Founding Fathers believed devotedly that there was a God and that the unalienable rights of man were rooted in Him is clearly evidenced in their writings, from the Mayflower Compact to the Constitution itself. This background is evidenced today in our public life through the continuance in our oaths of office from the Presidency to the Alderman of the final supplication, "So help me God." Likewise each House of the Congress provides through its Chaplain an opening prayer, and the sessions of this Court are declared open by the crier in a short ceremony, the final phrase of which invokes the grace of God. Again, there are such manifestations in our military forces, where those of our citizens who are under the restrictions of military service wish to engage in voluntary worship. Indeed, only last year an official survey of the country indicated that 64% of our people have church membership, Bureau of the Census, U. S. Department of Commerce, Statistical Abstract of the United States (83d ed. 1962), 48, while less than 3% profess no religion whatever. Id., at p. 46. It can be truly said, therefore, that today, as in the beginning, our national life reflects a religious people who, in the words of Madison, are "earnestly praying, as * * * in duty bound, that the Supreme Lawgiver of the Universe * * guide them into every measure which may be worthy of his [blessing * *.]" Memorial and Remonstrance Against Religious Assessments, quoted in Everson v. Board of Education, 330 U.S. 1, 71–72, 67 S.Ct. 504, 538–539, 91 L.Ed.

version may be used by those pupils who prefer it. Appropriate patriotic exercises should be held as a part of the general opening exercise of the school or class. Any child shall be excused from participating in the opening exercises or from attending the opening exercises upon the written request of his parent or guardian."

711 (1947) (Appendix to dissenting opinion of Rutledge, J.).

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This is not to say, however, that religion has been so identified with our history and government that religious freedom is not likewise as strongly imbeded in our public and private life. Nothing but the most telling of personal experiences in religious persecution suffered by our forebears, see Everson v. Board of Education, supra, 330 U.S., at 8–11, 67 S.Ct., at 507–509, 91 L.Ed. 711, could have planted our belief in liberty of religious opinion any more deeply in our heritage. It is true that this liberty frequently was not realized by the colonists, but this is readily accountable by their close ties to the Mother Country.[5] However, the views of Madison and Jefferson, preceded by Roger Williams,[6] came to be incorporated not only in the Federal Constitution but likewise in those of most of our States. This freedom to worship was indispensable in a country whose people came from the four quarters of the earth and brought with them a diversity of religious opinion. Today authorities list 83 separate religious bodies, each with membership exceeding 50,000, existing among our people, as well as innumerable smaller groups. Bureau of the Census, op. cit., supra, at 46–47.

5. There were established churches in at least eight of the original colonies, and various degrees of religious support in others as late as the Revolutionary War. See Engel v. Vitale, supra, 370 U.S., at 428, n. 10, 82 S.Ct., at 1265, 8 L.Ed.2d 601.

6. "There goes many a ship to sea, with many hundred souls in one ship, whose weal and woe is common, and is a true picture of a commonwealth, or human combination, or society. It hath fallen out sometimes, that both Papists and Protestants, Jews and Turks, may be embarked in one ship; upon which supposal, I affirm that all the liberty of conscience I ever pleaded for, turns upon these two hinges, that none of the Papists, Protestants, Jews, or Turks be forced to come to the ship's prayers or worship, nor compelled from their own particular prayers or worship, if they practice any."

III.

Almost a hundred years ago in Minor v. Board of Education of Cincinnati,[7] Judge Alphonso Taft, father

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of the revered Chief Justice, in an unpublished opinion stated the ideal of our people as to religious freedom as one of

> "absolute equality before the law, of all religious opinions and sects * * *.
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> "The government is neutral, and, while protecting all, it prefers none, and it *disparages* none."

Before examining this "neutral" position in which the Establishment and Free Exercise Clauses of the First Amendment place our Government it is well that we discuss the reach of the Amendment under the cases of this Court.

[1] First, this Court has decisively settled that the First Amendment's mandate that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof" has been made wholly applicable to the States by the Fourteenth Amendment. Twenty-three years ago in Cantwell v. Connecticut, 310 U.S. 296, 303, 60 S.Ct.

7. Superior Court of Cincinnati, February 1870. The opinion is not reported but is published under the title, The Bible in the Common Schools (Cincinnati: Robert Clarke & Co. 1870). Judge Taft's views, expressed in dissent, prevailed on appeal. See Board of Education of Cincinnati v. Minor, 23 Ohio St. 211, 253 (1872), in which the Ohio Supreme Court held that:
"The great bulk of human affairs and human interests is left by any free government to individual enterprise and individual action. Religion is eminently one of these interests, lying outside the true and legitimate province of government."

900, 903, 84 L.Ed. 1213 (1940), this Court, through Mr. Justice Roberts, said:

> "The fundamental concept of liberty embodied in that [Fourteenth] Amendment embraces the liberties guaranteed by the First Amendment. The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment
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> has rendered the legislatures of the states as incompetent as Congress to enact such laws. * * *"[8]

In a series of cases since Cantwell the Court has repeatedly reaffirmed that doctrine, and we do so now. Murdock v. Commonwealth of Pennsylvania, 319 U. S. 105, 108, 63 S.Ct. 870, 872, 87 L.Ed. 1292 (1943); Everson v. Board of Education, supra; Illinois ex rel. McCollum v. Board of Education, 333 U.S. 203, 210–211, 68 S.Ct. 461, 464–465, 92 L.Ed. 648 (1948); Zorach v. Clauson, supra; McGowan v. Maryland, 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961); Torcaso v. Watkins, 367 U.S. 488, 81 S.Ct. 1680, 6 L.Ed.2d 982 (1961); and Engel v. Vitale, supra.

[2] Second, this Court has rejected unequivocally the contention that the Establishment Clause forbids only governmental preference of one religion over another. Almost 20 years ago in Everson, supra, 330 U.S., at 15, 67 S.Ct., at 511, 91 L.Ed. 711, the Court said that "[n]either a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another." And Mr. Justice Jackson, dissenting, agreed:

> "There is no answer to the proposition * * * that the effect of the religious freedom Amendment to our Constitution was to take every form of propagation of religion out of the realm of things which could directly or indirectly be made public business and thereby be supported in whole or in part at taxpayers' expense. * * * This freedom was first in the Bill of Rights because it was first in the forefathers' minds; it was set forth in absolute terms, and its strength is its rigidity." Id., 330 U.S., at 26, 67 S.Ct., at 516, 91 L.Ed. 711.

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Further, Mr. Justice Rutledge, joined by Justices Frankfurter, Jackson and Burton, declared:

> "The [First] Amendment's purpose was not to strike merely at the official establishment of a single sect, creed or religion, outlawing only a formal relation such as had prevailed in England and some of the colonies. Necessarily it was to uproot all such relationships. But the object was broader than separating church and state in this narrow sense. It was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion." Id., 330 U.S., at 31–32, 67 S.Ct., at 519, 91 L.Ed. 711.

The same conclusion has been firmly maintained ever since that time, see Illinois ex rel. McCollum, supra, 333 U.S., at pp. 210–211, 68 S.Ct., at pp. 464–465,

8. Application to the States of other clauses of the First Amendment obtained even before Cantwell. Almost 40 years ago in the opinion of the Court in Gitlow v. People of State of New York, 268 U.S. 652, 666, 45 S.Ct. 625, 630, 69 L.Ed. 1138 (1925), Mr. Justice Sanford said: "For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States."

92 L.Ed. 648; McGowan v. Maryland, supra, 366 U.S., at 442–443, 81 S.Ct., at 1113–1114, 6 L.Ed.2d 393; Torcaso v. Watkins, supra, 367 U.S., at 492–493, 495, 81 S.Ct., at 1682–1683, 1684, 6 L.Ed.2d 982, and we reaffirm it now.

While none of the parties to either of these cases has questioned these basic conclusions of the Court, both of which have been long established, recognized and consistently reaffirmed, others continue to question their history, logic and efficacy. Such contentions, in the light of the consistent interpretation in cases of this Court, seem entirely untenable and of value only as academic exercises.

IV.

The interrelationship of the Establishment and the Free Exercise Clauses was first touched upon by Mr. Justice Roberts for the Court in Cantwell v. Connecticut, supra, 310 U.S., at 303–304, 60 S.Ct., at 903, 84 L.Ed. 1213, where it was said that their "inhibition of legislation" had

> "a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of
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> conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion. Thus the Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be."

A half dozen years later in Everson v. Board of Education, supra, 330 U.S., at 14–15, 67 S.Ct., at 511, 91 L.Ed. 711, this Court, through Mr. Justice BLACK, stated that the "scope of the First Amendment * * * was designed forever to suppress" the establishment of religion or the prohibition of the free exercise thereof. In short, the Court held that the Amendment

> "requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions, than it is to favor them." Id., 330 U.S., at 18, 67 S.Ct. at 513, 91 L.Ed. 711.

And Mr. Justice Jackson, in dissent, declared that public schools are organized

> "on the premise that secular education can be isolated from all religious teaching so that the school can inculcate all needed temporal knowledge and also maintain a strict and lofty neutrality as to religion. The assumption is that after the individual has been instructed in worldly wisdom he will be better fitted to chose his religion." Id., 330 U.S., at 23–24, 67 S.Ct. at 515, 91 L.Ed. 711.

Moreover, all of the four dissenters, speaking through Mr. Justice Rutledge, agreed that

> "Our constitutional policy * * does not deny the value or the necessity for religious training, teaching or observance. Rather it secures their free exercise. But to that end it does deny that the state can undertake or sustain them in any form or degree. For this
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> reason the sphere of religious activity, as distinguished from the secular intellectual liberties, has been given the twofold protection and, as the state cannot forbid, neither can it perform or aid in performing the religious function. The dual prohibition makes that function altogether private." Id., 330 U.S., at 52, 67 S.Ct., at 529, 91 L.Ed. 711.

Only one year later the Court was asked to reconsider and repudiate the

doctrine of these cases in McCollum v. Board of Education. It was argued that "historically the First Amendment was intended to forbid only government preference of one religion over another * *. In addition they ask that we distinguish or overrule our holding in the Everson case that the Fourteenth Amendment made the 'establishment of religion' clause of the First Amendment applicable as a prohibition against the States." 333 U.S., at 211, 68 S.Ct., at 465, 92 L.Ed. 648. The Court, with Mr. Justice Reed alone dissenting, was unable to "accept either of these contentions." Ibid. Mr. Justice Frankfurter, joined by Justices Jackson, Rutledge and Burton, wrote a very comprehensive and scholarly concurrence in which he said that "[s]eparation is a requirement to abstain from fusing functions of Government and of religious sects, not merely to treat them all equally." Id., 333 U.S., at 227, 68 S.Ct., at 473, 92 L.Ed. 648. Continuing, he stated that:

> "the Constitution * * * prohibited the Government common to all from becoming embroiled, however innocently, in the destructive religious conflicts of which the history of even this country records some dark pages." Id., 333 U.S., at 228, 68 S.Ct., at 473, 92 L.Ed. 648.

In 1952 in Zorach v. Clauson, supra, Mr. Justice DOUGLAS for the Court reiterated:

> "There cannot be the slightest doubt that the First Amendment reflects the philosophy that Church and State should be separated. And so far as interference with the 'free exercise' of religion and an
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> 'establishment' of religion are concerned, the separation must be complete and unequivocal. The First Amendment within the scope of its coverage permits no exception; the prohibition is absolute. The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other. That is the common sense of the matter." 343 U.S., at 312, 72 S.Ct., at 683, 96 L.Ed. 954.

And then in 1961 in McGowan v. Maryland and in Torcaso v. Watkins each of these cases was discussed and approved. Chief Justice WARREN in McGowan, for a unanimous Court on this point, said:

> "But, the First Amendment, in its final form, did not simply bar a congressional enactment *establishing a church;* it forbade all laws *respecting an establishment of religion.* Thus, this Court has given the Amendment a 'broad interpretation * * * in the light of its history and the evils it was designed forever to suppress * * *.'" 366 U.S., at 441–442, 81 S.Ct., at 1113, 6 L.Ed.2d 393.

And Mr. Justice BLACK for the Court in Torcaso, without dissent but with Justices FRANKFURTER and HARLAN concurring in the result, used this language:

> "We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person 'to profess a belief or disbelief in any religion.' Neither can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs." 367 U.S., at 495, 81 S.Ct., at 1683, 6 L.Ed.2d 982.

Finally, in Engel v. Vitale, only last year, these principles were so universally recognized that the Court, without
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the citation of a single case and over the sole dissent of Mr. Justice STEWART,

reaffirmed them. The Court found the 22-word prayer used in "New York's program of daily classroom invocation of God's blessings as prescribed in the Regents' prayer * * * [to be] a religious activity." 370 U.S., at 424, 82 S.Ct., at 1264, 8 L.Ed.2d 601. It held that "it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government." Id., 370 U.S., at 425, 82 S.Ct., at 1264, 8 L.Ed.2d 601. In discussing the reach of the Establishment and Free Exercise Clauses of the First Amendment the Court said:

> "Although these two clauses may in certain instances overlap, they forbid two quite different kinds of governmental encroachment upon religious freedom. The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not. This is not to say, of course, that laws officially prescribing a particular form of religious worship do not involve coercion of such individuals. When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain." Id., 370 U.S., at 430–431, 82 S.Ct., at 1267, 8 L.Ed.2d 601.

And in further elaboration the Court found that the "first and most immediate purpose [of the Establishment Clause] rested on the belief that a union of government and religion tends to destroy government and to degrade religion." Id., 370 U.S. at 431, 82 S.Ct., at 1267, 8 L.Ed.2d 601. When government, the Court said, allies itself with one particular form of religion, the

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inevitable result is that it incurs "the hatred, disrespect and even contempt of those who held contrary beliefs." Ibid.

V.

[3–9] The wholesome "neutrality" of which this Court's cases speak thus stems from a recognition of the teachings of history that powerful sects or groups might bring about a fusion of governmental and religious functions or a concert or dependency of one upon the other to the end that official support of the State or Federal Government would be placed behind the tenets of one or of all orthodoxies. This the Establishment Clause prohibits. And a further reason for neutrality is found in the Free Exercise Clause, which recognizes the value of religious training, teaching and observance and, more particularly, the right of every person to freely choose his own course with reference thereto, free of any compulsion from the state. This the Free Exercise Clause guarantees. Thus, as we have seen, the two clauses may overlap. As we have indicated, the Establishment Clause has been directly considered by this Court eight times in the past score of years and, with only one Justice dissenting on the point, it has consistently held that the clause withdrew all legislative power respecting religious belief or the expression thereof. The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion. Everson v. Board of Education, supra; McGowan v. Maryland, supra, 366 U.S., at 442, 81 S.Ct. at 1113–1114, 6 L.Ed.2d

393. The Free Exercise Clause, likewise considered many times here, withdraws from legislative power, state and federal, the exertion of any restraint on the free exercise

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of religion. Its purpose is to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority. Hence it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion. The distinction between the two clauses is apparent—a violation of the Free Exercise Clause is predicated on coercion while the Establishment Clause violation need not be so attended.

[10] Applying the Establishment Clause principles to the cases at bar we find that the States are requiring the selection and reading at the opening of the school day of verses from the Holy Bible and the recitation of the Lord's Prayer by the students in unison. These exercises are prescribed as part of the curricular activities of students who are required by law to attend school. They are held in the school buildings under the supervision and with the participation of teachers employed in those schools. None of these factors, other than compulsory school attendance, was present in the program upheld in Zorach v. Clauson. The trial court in No. 142 has found that such an opening exercise is a religious ceremony and was intended by the State to be so. We agree with the trial court's finding as to the religious character of the exercises. Given that finding, the exercises and the law requiring them are in violation of the Establishment Clause.

[11] There is no such specific finding as to the religious character of the exercises in No. 119, and the State contends (as does the State in No. 142) that the program is an effort to extend its benefits to all public school children without regard to their religious belief. Included within its secular purposes, it says, are the promotion of moral values, the contradiction to the materialistic trends of our times, the perpetuation of our institutions and the teaching of literature. The case came up

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on demurrer, of course, to a petition which alleged that the uniform practice under the rule had been to read from the King James version of the Bible and that the exercise was sectarian. The short answer, therefore, is that the religious character of the exercise was admitted by the State. But even if its purpose is not strictly religious, it is sought to be accomplished through readings, without comment, from the Bible. Surely the place of the Bible as an instrument of religion cannot be gainsaid, and the State's recognition of the pervading religious character of the ceremony is evident from the rule's specific permission of the alternative use of the Catholic Douay version as well as the recent amendment permitting nonattendance at the exercises. None of these factors is consistent with the contention that the Bible is here used either as an instrument for nonreligious moral inspiration or as a reference for the teaching of secular subjects.

[12–16] The conclusion follows that in both cases the laws require religious exercises and such exercises are being conducted in direct violation of the rights of the appellees and petitioners.[9]

9. It goes without saying that the laws and practices involved here can be challenged only by persons having standing to complain. But the requirements for standing to challenge state action under the Establishment Clause, unlike those relating to the Free Exercise Clause, do not include proof that particular religious freedoms are infringed. McGowan v. Maryland, supra, 366 U.S., at 429–430, 81 S.Ct., at 1106–1107, 6 L.Ed.2d 393. The parties here are school children and their parents, who are directly affected by the laws and practices against which their complaints are directed. These interests surely suffice to give the parties standing to complain. See Engel v. Vitale, supra. Cf. McCollum v. Board of

Nor are these required exercises mitigated by the fact that individual students may absent

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themselves upon parental request, for that fact furnishes no defense to a claim of unconstitutionality under the Establishment Clause. See Engel v. Vitale, supra, 370 U.S., at 430, 82 S.Ct., at 1266–1267, 8 L.Ed.2d 601. Further, it is no defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment. The breach of neutrality that is today a trickling stream may all too soon become a raging torrent and, in the words of Madison, "it is proper to take alarm at the first experiment on our liberties." Memorial and Remonstrance Against Religious Assessments, quoted in Everson, supra, 330 U.S., at 65, 67 S.Ct., at 536, 91 L.Ed. 711.

[17, 18] It is insisted that unless these religious exercises are permitted a "religion of secularism" is established in the schools. We agree of course that the State may not establish a "religion of secularism" in the sense of affirmatively opposing or showing hostility to religion, thus "preferring those who believe in no religion over those who do believe." Zorach v. Clauson, supra, 343 U.S., at 314, 72 S.Ct., at 684, 96 L.Ed. 954. We do not agree, however, that this decision in any sense has that effect. In addition, it might well be said that one's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization. It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment. But the exercises here do not fall into those categories. They are religious exercises, required by the States in violation of the command of the First Amendment that the Government maintain strict neutrality, neither aiding nor opposing religion.

[19, 20] Finally, we cannot accept that the concept of neutrality, which does not permit a State to require a religious exercise even with the consent of the majority of those

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affected, collides with the majority's right to free exercise of religion.[10] While the Free Exercise Clause clearly prohibits the use of state action to deny the rights of free exercise to *anyone*, it has never meant that a majority could use the machinery of the State to practice its beliefs. Such a contention was effectively answered by Mr. Justice Jackson for the Court in West Virginia Board of Education v. Barnette, 319 U.S. 624, 638, 63 S.Ct. 1178, 1185, 87 L.Ed. 1628 (1943):

> "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to * * * freedom of worship * * * and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."

Education, supra; Everson v. Board of Education, supra. Compare Doremus v. Board of Education, 342 U.S. 429, 72 S.Ct. 394, 96 L.Ed. 475 (1952), which involved the same substantive issues presented here. The appeal was there dismissed upon the graduation of the school child involved and because of the appellants' failure to establish standing as taxpayers.

10. We are not of course presented with and therefore do not pass upon a situation such as military service, where the Government regulates the temporal and geographic environment of individuals to a point that, unless it permits voluntary religious services to be conducted with the use of government facilities, military personnel would be unable to engage in the practice of their faiths.

[21] The place of religion in our society is an exalted one, achieved through a long tradition of reliance on the home, the church and the inviolable citadel of the individual heart and mind. We have come to recognize through bitter experience that it is not within the power of government to invade that citadel, whether its purpose or effect be to aid or oppose, to advance or retard. In the relationship between man and religion, the State is firmly committed to a position of neutrality. Though the application of that rule requires interpretation of a delicate sort, the rule itself is clearly and concisely stated in the words of the First Amendment. Applying that rule to the facts of these cases, we affirm the judgment in No. 142.

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In No. 119, the judgment is reversed and the cause remanded to the Maryland Court of Appeals for further proceedings consistent with this opinion.

It is so ordered.

Judgment in No. 142 affirmed; judgment in No. 119 reversed and cause remanded with directions.

Mr. Justice DOUGLAS, concurring.

I join the opinion of the Court and add a few words in explanation.

While the Free Exercise Clause of the First Amendment is written in terms of what the State may not require of the individual, the Establishment Clause, serving the same goal of individual religious freedom, is written in different terms.

Establishment of a religion can be achieved in several ways. The church and state can be one; the church may control the state or the state may control the church; or the relationship may take one of several possible forms of a working arrangement between the two bodies.[1] Under all of these arrangements the church typically has a place in the state's budget, and church law usually governs such matters as baptism, marriage, divorce and separation, at least for its members and sometimes for the entire body politic.[2] Education, too, is usually high on the priority

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list of church interests.[3] In the past schools were often made the exclusive responsibility of the church. Today in some state-church countries the state runs the public schools, but compulsory religious exercises are often required of some or all students. Thus, under the agreement Franco made with the Holy See when he came to power in Spain, "The Church regained its place in the national budget. It insists on baptizing all children and has made the catechism obligatory in state schools."[4]

The vice of all such arrangements under the Establishment Clause is that the state is lending its assistance to a church's efforts to gain and keep adherents. Under the First Amendment it is strictly a matter for the individual and his church as to what church he will be-

1. See Bates, Religious Liberty: An Inquiry (1945), 9–14, 239–252; Cobb, Religious Liberty in America (1902), 1–2, cc. IV, V; Gledhill, Pakistan, The Development of its Laws and Constitution (8 British Commonwealth, 1957), 11–15; Keller, Church and State on the European Continent (1936), c. 2; Pfeffer, Church, State, and Freedom (1953), c. 2; I Stokes, Church and State in the United States (1950), 151–169.

2. See III Stokes, op. cit., supra, n. 1, 42–67; Bates, op. cit., supra, n. 1, 9–11, 58–59, 98, 245; Gledhill, op. cit., supra, n. 1, 128, 192, 205, 208; Rackman, Israel's Emerging Constitution (1955), 120–134; Drinan, Religious Freedom in Israel, America (Apr. 6, 1963), 456–457.

3. See II Stokes, op. cit., supra, n. 1, 488–548; Boles, The Bible, Religion, and the Public Schools (2d ed. 1963), 4–10; Rackman, op. cit., supra, n. 2, at 136–141; O'Brien, The Engel Case From A Swiss Perspective, 61 Mich.L.Rev. 1069; Freund, Muslim Education in West Pakistan, 56 Religious Education 31.

4. Bates, op. cit., supra, n. 1, at 18; Pfeffer, op. cit., supra, n. 1, at 28–31; Thomas, The Balance of Forces in Spain, 41 Foreign Affairs 208, 210.

long to and how much support, in the way of belief, time, activity or money, he will give to it. "This pure Religious Liberty" "declared * * * [all forms of church-state relationships] and their fundamental idea to be oppressions of conscience and abridgments of that liberty which God and nature had conferred on every living soul." [5]

In these cases we have no coercive religious exercise aimed at making the students conform. The prayers announced are not compulsory, though some may think they have that indirect effect because the nonconformist student may be induced to participate for fear of being called an "oddball." But that coercion, if it be present,

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has not been shown; so the vices of the present regimes are different.

These regimes violate the Establishment Clause in two different ways. In each case the State is conducting a religious exercise; and, as the Court holds, that cannot be done without violating the "neutrality" required of the State by the balance of power between individual, church and state that has been struck by the First Amendment. But the Establishment Clause is not limited to precluding the State itself from conducting religious exercises. It also forbids the State to employ its facilities or funds in a way that gives any church, or all churches, greater strength in our society than it would have by relying on its members alone. Thus, the present regimes must fall under that clause for the additional reason that public funds, though small in amount, are being used to promote a religious exercise. Through the mechanism of the State, all of the people are being required to finance a religious exercise that only some of the people want and that violates the sensibilities of others.

The most effective way to establish any institution is to finance it; and this truth is reflected in the appeals by church groups for public funds to finance their religious schools.[6] Financing a church either in its strictly religious activities or in its other activities is equally unconstitutional, as I understand the Establishment Clause. Budgets for one activity may be technically separable from budgets for others.[7] But the institution is an inseparable whole, a living organism, which is strengthened in proselytizing when it is strengthened in any department by contributions from other than its own members.

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Such contributions may not be made by the State even in a minor degree without violating the Establishment Clause. It is not the amount of public funds expended; as this case illustrates, it is the use to which public funds are put that is controlling. For the First Amendment does not say that some forms of establishment are allowed; it says that "no law respecting an establishment of religion" shall be made. What may not be done directly may not be done indirectly lest the Establishment Clause become a mockery.

Mr. Justice BRENNAN, concurring.

Almost a century and a half ago, John Marshall, in M'Culloch v. Maryland, enjoined: "* * * we must never forget, that it is *a constitution* we are expounding." 4 Wheat. 316, 407, 4 L.Ed. 579. The Court's historic duty to expound the meaning of the Constitution has encountered few issues more intricate or more demanding than that of the relationship between religion and the public schools. Since undoubtedly we are "a religious people whose institutions presuppose a Supreme Being," Zorach v. Clauson, 343 U.S. 306, 313, 72

5. Cobb, op. cit., supra, n. 1, at 2.

6. See II Stokes, op. cit., supra, n. 1, at 681–695.

7. See Accountants' Handbook (4th ed. 1956) 4.8–4.15.

S.Ct. 679, 684, 96 L.Ed. 954, deep feelings are aroused when aspects of that relationship are claimed to violate the injunction of the First Amendment that government may make "no law respecting an establishment of religion, or prohibiting the free exercise thereof * *." Americans regard the public schools as a most vital civic institution for the preservation of a democratic system of government. It is therefore understandable that the constitutional prohibitions encounter their severest test when they are sought to be applied in the school classroom. Nevertheless it is this Court's inescapable duty to declare whether exercises in the public schools of the States, such as those of Pennsylvania and Maryland questioned here, are involvements of religion in public institutions of a kind which offends the First and Fourteenth Amendments.

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When John Locke ventured in 1689, "I esteem it above all things necessary to distinguish exactly the business of civil government from that of religion and to settle the just bounds that lie between the one and the other," [1] he anticipated the necessity which would be thought by the Framers to require adoption of a First Amendment, but not the difficulty that would be experienced in defining those "just bounds." The fact is that the line which separates the secular from the sectarian in American life is elusive. The difficulty of defining the boundary with precision inheres in a paradox central to our scheme of liberty. While our institutions reflect a firm conviction that we are a religious people, those institutions by solemn constitutional injunction may not officially involve religion in such a way as to prefer, discriminate against, or oppress, a particular sect or religion. Equally the Constitution enjoins those involvements of religious with secular institutions which (a) serve the essentially religious activities of religious institutions; (b) employ the organs of government for essentially religious purposes; or (c) use essentially religious means to serve governmental ends where secular means would suffice. The constitutional mandate expresses a deliberate and considered judgment that such matters are to be left to the conscience of the citizen, and declares as a basic postulate of the relation between the citizen and his government that "the rights of conscience are, in their nature, of peculiar delicacy, and will little bear the gentlest touch of governmental hand * * *." [2]

I join fully in the opinion and the judgment of the Court. I see no escape from the conclusion that the exercises

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called in question in these two cases violate the constitutional mandate. The reasons we gave only last Term in Engel v. Vitale, 370 U.S. 421, 82 S.Ct. 1261, 8 L.Ed.2d 601, for finding in the New York Regents' prayer an impermissible establishment of religion, compel the same judgment of the practices at bar. The involvement of the secular with the religious is no less intimate here; and it is constitutionally irrelevant that the State has not composed the material for the inspirational exercises presently involved. It should be unnecessary to observe that our holding does not declare that the First Amendment manifests hostility to the practice or teaching of religion, but only applies prohibitions incorporated in the Bill of Rights in recognition of historic needs shared by Church and State alike. While it is my view that not every involvement of religion in public life is unconstitutional, I consider the exercises at bar a form of involvement which clearly violates the Establishment Clause.

The importance of the issue and the deep conviction with which views on

1. Locke, A Letter Concerning Toleration, in 35 Great Books of the Western World (Hutchins ed. 1952), 2.

2. Representative Daniel Carroll of Maryland during debate upon the proposed Bill of Rights in the First Congress, August 15, 1789, I Annals of Cong. 730.

both sides are held seem to me to justify detailing at some length my reasons for joining the Court's judgment and opinion.

I.

The First Amendment forbids both the abridgment of the free exercise of religion and the enactment of laws "respecting an establishment of religion." The two clauses, although distinct in their objectives and their applicability, emerged together from a common panorama of history. The inclusion of both restraints upon the power of Congress to legislate concerning religious matters shows unmistakably that the Framers of the First Amendment were not content to rest the protection of religious liberty exclusively upon either clause. "In assuring the free exercise of religion," Mr. Justice Frankfurter has said,[233] "the Framers of the First Amendment were sensitive to the then recent history of those persecutions and impositions of civil disability with which sectarian majorities in virtually all of the Colonies had visited deviation in the matter of conscience. This protection of unpopular creeds, however, was not to be the full extent of the Amendment's guarantee of freedom from governmental intrusion in matters of faith. The battle in Virginia, hardly four years won, where James Madison had led the forces of disestablishment in successful opposition to Patrick Henry's proposed Assessment Bill levying a general tax for the support of Christian teachers, was a vital and compelling memory in 1789." McGowan v. Maryland, 366 U.S. 420, 464–465, 81 S.Ct. 1101, 1155–1156, 6 L.Ed.2d 393.

It is true that the Framers' immediate concern was to prevent the setting up of an official federal church of the kind which England and some of the Colonies had long supported. But nothing in the text of the Establishment Clause supports the view that the prevention of the setting up of an official church was meant to be the full extent of the prohibitions against official involvements in religion. It has rightly been said:

> "If the framers of the Amendment meant to prohibit Congress merely from the establishment of a 'church,' one may properly wonder why they didn't so state. That the words *church* and *religion* were regarded as synonymous seems highly improbable, particularly in view of the fact that the contemporary state constitutional provisions dealing with the subject of establishment used definite phrases such as 'religious sect,' 'sect,' or 'denomination.' * * * With such specific wording in contemporary state constitutions, why was not a similar wording adopted for the First Amendment if its framers intended to prohibit nothing more than what the States were prohibiting?"[234] Lardner, How Far Does the Constitution Separate Church and State? 45 Am.Pol.Sci.Rev. 110, 112 (1951).

Plainly, the Establishment Clause, in the contemplation of the Framers, "did not limit the constitutional proscription to any particular, dated form of state-supported theological venture." "What Virginia had long practiced, and what Madison, Jefferson and others fought to end, was the extension of civil government's support to religion in a manner which made the two in some degree interdependent, and thus threatened the freedom of each. The purpose of the Establishment Clause was to assure that the national legislature would not exert its power in the service of any purely religious end; that it would not, as Virginia and virtually all of the Colonies had done, make of religion, as religion, an object of legislation. * * * The Establishment Clause withdrew from the sphere of legitimate legislative concern and competence a specific, but comprehensive, area of human conduct: man's belief or disbelief in the verity

of some transcendental idea and man's expression in action of that belief or disbelief." McGowan v. Maryland, supra, 366 U.S. at 465–466, 81 S.Ct. at 1156–1157 (opinion of Frankfurter, J.).

In sum, the history which our prior decisions have summoned to aid interpretation of the Establishment Clause permits little doubt that its prohibition was designed comprehensively to prevent those official involvements of religion which would tend to foster or discourage religious worship or belief.

But an awareness of history and an appreciation of the aims of the Founding Fathers do not always resolve concrete problems. The specific question before us has, for example, aroused vigorous dispute whether the architects of the First Amendment—James Madison and Thomas Jefferson particularly—understood the prohibition against any "law respecting an establishment of

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religion" to reach devotional exercises in the public schools.[3] It may be that Jefferson and Madison would have held such exercises to be permissible—although even in Jefferson's case serious doubt is suggested by his admonition against "putting the Bible and Testament into the hands of the children at an age when their judgments are not sufficiently matured for religious inquiries. * * *"[4] But

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I doubt that their view, even if perfectly clear one way or the other, would supply a dispositive answer to the question presented by these cases. A more fruitful inquiry, it seems to me, is whether the practices here challenged threaten those consequences which the Framers deeply feared; whether, in short, they tend to promote that type of interdependence between religion and state which the First Amendment was designed to prevent.[5] Our task is to trans-

3. See Healey, Jefferson on Religion in Public Education (1962); Boles, The Bible, Religion, and the Public Schools (1961), 16–21; Butts, The American Tradition in Religion and Education (1950), 119–130; Cahn, On Government and Prayer, 37 N.Y.U.L.Rev. 981 (1962); Costanzo, Thomas Jefferson, Religious Education and Public Law, 8 J.Pub.Law 81 (1959); Comment, The Supreme Court, the First Amendment, and Religion in the Public Schools, 63 Col.L.Rev. 73, 79–83 (1963).

4. Jefferson's caveat was in full:
"Instead, therefore, of putting the Bible and Testament into the hands of the children at an age when their judgments are not sufficiently matured for religious inquiries, their memories may here be stored with the most useful facts from Grecian, Roman, European and American history." 2 Writings of Thomas Jefferson (Memorial ed. 1903), 204.
Compare Jefferson's letter to his nephew, Peter Carr, when the latter was about to begin the study of law, in which Jefferson outlined a suggested course of private study of religion since "[y]our reason is now mature enough to examine this object." Letter to Peter Carr, August 10, 1787, in Padover, The Complete Jefferson (1943), 1058. Jefferson seems to have opposed sectarian instruction at any level of public education, see Healey, Jefferson on Religion in Public Education (1962), 206–210, 256, 264–265. The absence of any mention of religious instruction in the projected elementary and secondary schools contrasts significantly with Jefferson's quite explicit proposals concerning religious instruction at the University of Virginia. His draft for "A Bill for the More General Diffusion of Knowledge" in 1779, for example, outlined in some detail the secular curriculum for the public schools, while avoiding any references to religious studies. See Padover, supra, at 1048–1054. The later draft of an "Act for Establishing Elementary Schools" which Jefferson submitted to the Virginia General Assembly in 1817 provided that "no religious reading, instruction or exercise, shall be prescribed or practiced inconsistent with the tenets of any religious sect or denomination." Padover, supra, at 1076. Reliance upon Jefferson's apparent willingness to permit certain religious instruction at the University seems, therefore, to lend little support to such instruction in the elementary and secondary schools. Compare, e. g., Corwin, A Constitution of Powers in a Secular State (1951), 104–106; Costanzo, Thomas Jefferson, Religious Education and Public Law, 8 J.Pub.Law 81, 100–106 (1959).

5. Cf. Mr. Justice Rutledge's observations in Everson v. Board of Education, 330 U.S.

late "the majestic generalities of the Bill of Rights, conceived as part of the pattern of liberal government in the eighteenth century, into concrete restraints on officials

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dealing with the problems of the twentieth century * * *." West Virginia State Board of Education v. Barnette, 319 U.S. 624, 639, 63 S.Ct. 1178, 1186, 87 L.Ed. 1628.

A too literal quest for the advice of the Founding Fathers upon the issues of these cases seems to me futile and misdirected for several reasons: First, on our precise problem the historical record is at best ambiguous, and statements can readily be found to support either side of the proposition. The ambiguity of history is understandable if we recall the nature of the problems uppermost in the thinking of the statesmen who fashioned the religious guarantees; they were concerned with far more flagrant intrusions of government into the realm of religion than any that our century has witnessed.[6] While it is clear to me that the Framers meant the Establishment Clause to prohibit more than the creation of an established federal church such as existed in England, I have no doubt that, in their preoccupation with the imminent question of established churches, they gave no distinct

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consideration to the particular question whether the clause also forbade devotional exercises in public institutions.

Second, the structure of American education has greatly changed since the First Amendment was adopted. In the context of our modern emphasis upon public education available to all citizens, any views of the eighteenth century as to whether the exercises at bar are an "establishment" offer little aid to decision. Educa-

1, 53–54, 67 S.Ct. 504, 529–530, 91 L.Ed. 711 (dissenting opinion). See also Fellman, Separation of Church and State in the United States: A Summary View, 1950 Wis.L.Rev. 427, 428–429; Rosenfield, Separation of Church and State in the Public Schools, 22 U. of Pitt.L.Rev. 561, 569 (1961); MacKinnon, Freedom?—or Toleration? The problem of Church and State in the United States, [1959] Pub.Law 374. One author has suggested these reasons for cautious application of the history of the Constitution's religious guarantees to contemporary problems:

"First, the brevity of Congressional debate and the lack of writings on the question by the framers make any historical argument inconclusive and open to serious question. Second, the amendment was designed to outlaw practices which had existed before its writing, but there is no authoritative declaration of the specific practices at which it was aimed. And third, most of the modern religious-freedom cases turn on issues which were at most academic in 1789 and perhaps did not exist at all. Public education was almost nonexistent in 1789, and the question of religious education in public schools may not have been foreseen." Beth, The American Theory of Church and State (1958), 88.

6. See generally, for discussion of the early efforts for disestablishment of the established colonial churches, and of the conditions against which the proponents of separation of church and state contended, Sweet, The Story of Religion in America (1950), c. XIII; Cobb, The Rise of Religious Liberty in America (1902), c. IX; Eckenrode, Separation of Church and State in Virginia (1910); Brant, James Madison—The Nationalist, 1780–1787 (1948), c. XXII; Bowers, The Young Jefferson (1945), 193–199; Butts, The American Tradition in Religion and Education (1950), c. II; Kruse, The Historical Meaning and Judicial Construction of the Establishment of Religion Clause of the First Amendment, 2 Washburn L.J. 65, 79–83 (1962). Compare also Alexander Hamilton's conception of "the characteristic difference between a tolerated and established religion" and his grounds of opposition to the latter, in his remarks on the Quebec Bill in 1775, 2 Works of Alexander Hamilton (Hamilton ed. 1850), 133–138. Compare, for the view that contemporary evidence reveals a design of the Framers to forbid not only formal establishment of churches, but various forms of incidental aid to or support of religion, Lardner, How Far Does the Constitution Separate Church and State? 45 Am.Pol.Sci.Rev. 110, 112–115 (1951).

tion, as the Framers knew it, was in the main confined to private schools more often than not under strictly sectarian supervision. Only gradually did control of education pass largely to public officials.[7] It would, therefore,

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hardly be significant if the fact was that the near-

7. The origins of the modern movement for free state-supported education cannot be fixed with precision. In England, the Levellers unavailingly urged in their platform of 1649 the establishment of free primary education for all, or at least for boys. See Brailsford, The Levellers and the English Revolution (1961), 534. In the North American Colonies, education was almost without exception under private sponsorship and supervision, frequently under control of the dominant Protestant sects. This condition prevailed after the Revolution and into the first quarter of the nineteenth century. See generally Mason, Moral Values and Secular Education (1950), c. II; Thayer, The Role of the School in American Society (1960), c. X; Greene, Religion and the State: The Making and Testing of an American Tradition (1941), 120–122. Thus, Virginia's colonial Governor Berkeley exclaimed in 1671: "I thank God there are no free schools nor printing, and I hope we shall not have them these hundred years; for learning has brought disobedience, and heresy, and sects into the world * * *." (Emphasis deleted.) Bates, Religious Liberty: An Inquiry (1945), 327.

The exclusively private control of American education did not, however, quite survive Berkeley's expectations. Benjamin Franklin's proposals in 1749 for a Philadelphia Academy heralded the dawn of publicly supported secondary education, although the proposal did not bear immediate fruit. See Johnson and Yost, Separation of Church and State in the United States (1948), 26–27. Jefferson's elaborate plans for a public school system in Virginia came to naught after the defeat in 1796 of his proposed Elementary School Bill, which found little favor among the wealthier legislators. See Bowers, The Young Jefferson (1945), 182–186. It was not until the 1820's and 1830's, under the impetus of Jacksonian democracy, that a system of public education really took root in the United States. See 1 Beard, The Rise of American Civilization (1937), 810–818. One force behind the development of secular public schools may have been a growing dissatisfaction with the tightly sectarian control over private education, see Harner, Religion's Place in General Education (1949), 29–30. Yet the burgeoning public school systems did not immediately supplant the old sectarian and private institutions; Alexis de Tocqueville, for example, remarked after his tour of the Eastern States in 1831 that "[a]lmost all education is entrusted to the clergy." 1 Democracy in America (Bradley ed. 1945) 309, n. 4. And compare Lord Bryce's observations, a half century later, on the still largely denominational character of American higher education, 2 The American Commonwealth (1933), 734–735.

Efforts to keep the public schools of the early nineteenth century free from sectarian influence were of two kinds. One took the form of constitutional provisions and statutes adopted by a number of States forbidding appropriations from the public treasury for the support of religious instruction in any manner. See Moehlman, The Wall of Separation Between Church and State (1951), 132–135; Lardner, How Far Does the Constitution Separate Church and State? 45 Am.Pol.Sci.Rev. 110, 122 (1951). The other took the form of measures directed against the use of sectarian reading and teaching materials in the schools. The texts used in the earliest public schools had been largely taken over from the private academies, and retained a strongly religious character and content. See Nichols, Religion and American Democracy (1959), 64–80; Kinney, Church and State, The Struggle for Separation in New Hampshire, 1630–1900 (1955), 150–153. In 1827, however, Massachusetts enacted a statute providing that school boards might not thereafter "direct any school books to be purchased or used, in any of the schools * * * which are calculated to favour any particular religious sect or tenet." 2 Stokes, Church and State in the United States (1950), 53. For further discussion of the background of the Massachusetts law and difficulties in its early application, see Dunn, What Happened to Religious Education? (1958), c. IV. As other States followed the example of Massachusetts, the use of sectarian texts was in time as widely prohibited as the appropriation of public funds for religious instruction.

Concerning the evolution of the American public school systems free of sec-

ly universal devotional exercises in the schools of the young Republic did not provoke criticism; even today religious ceremonies in church-supported private schools are constitutionally unobjectionable.

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Third, our religious composition makes us a vastly more diverse people than were our forefathers. They knew differences chiefly among Protestant sects. Today the Nation is far more heterogeneous religiously, including as it does substantial minorities not only of Catholics and Jews but as well of those who worship according to no version of the Bible and those who worship no God at all.[8]

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See Torcaso v. Watkins, 367 U.S. 488, 495, 81 S.Ct. 1680, 1683, 6 L.Ed.2d 982. In the face of such profound changes, practices which may have been objectionable to no one in the time of Jefferson and Madison may today be highly offensive to many persons, the deeply devout and the nonbelievers alike.

Whatever Jefferson or Madison would have thought of Bible reading or the recital of the Lord's Prayer in what few public schools existed in their day, our use of the history of their time must limit itself to broad purposes, not specific practices. By such a standard, I am persuaded, as is the Court, that the devotional exercises carried on in the Baltimore and Abington schools offend the First Amendment because they sufficiently threaten in our day those substantive evils the fear of which called forth the Establishment Clause of the First Amendment. It is "*a constitution* we are expounding," and our interpretation of the First Amendment must necessarily be responsive to the much more highly charged nature of religious questions in contemporary society.

Fourth, the American experiment in free public education available to all children has been guided in large measure by the dramatic evolution of the religious diversity among the population which our public schools serve. The interaction of these two important forces in our national life has placed in bold relief certain positive values in the consistent application to public institutions generally, and public schools particularly, of the constitutional decree against official involvements of religion which might produce the evils the Framers meant the Es-

tarian influence, compare Mr. Justice Frankfurter's account:

"It is pertinent to remind that the establishment of this principle of Separation in the field of education was not due to any decline in the religious beliefs of the people. Horace Mann was a devout Christian, and the deep religious feeling of James Madison is stamped upon the Remonstrance. The secular public school did not imply indifference to the basic role of religion in the life of the people, nor rejection of religious education as a means of fostering it. The claims of religion were not minimized by refusing to make the public schools agencies for their assertion. The non-sectarian or secular public school was the means of reconciling freedom in general with religious freedom. The sharp confinement of the public schools to secular education was a recognition of the need of a democratic society to educate its children, insofar as the State undertook to do so, in an atmosphere free from pressures in a realm in which pressures are most resisted and where conflicts are most easily and most bitterly engendered." Illinois ex rel. McCollum v. Board of Education, 333 U.S. 203, 216, 68 S.Ct. 461, 467, 92 L.Ed. 648.

8. The comparative religious homogeneity of the United States at the time the Bill of Rights was adopted has been considered in Haller, The Puritan Background of the First Amendment, in Read ed., The Constitution Reconsidered (1938), 131, 133–134; Beth, The American Theory of Church and State (1958), 74; Kinney, Church and State, The Struggle for Separation in New Hampshire, 1630–1900 (1955), 155–161. However, Madison suggested in the Fifty-first Federalist that the religious diversity which existed at the time of the Constitutional Convention constituted a source of strength for religious freedom, much as the multiplicity of economic and political interests enhanced the security of other civil rights. The Federalist (Cooke ed. 1961), 351–352.

tablishment Clause to forestall. The public schools are supported entirely, in most communities, by public funds—funds exacted not only from parents, nor alone from those who hold particular religious views, nor indeed from those who subscribe to any creed at all. It is implicit in the history and character of American public education that the public schools serve a uniquely

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public function: the training of American citizens in an atmosphere free of parochial, divisive, or separatist influences of any sort—an atmosphere in which children may assimilate a heritage common to all American groups and religions. See Illinois ex rel. McCollum v. Board of Education, 333 U.S. 203, 68 S.Ct. 461, 92 L.Ed. 648. This is a heritage neither theistic nor atheistic, but simply civic and patriotic. See Meyer v. Nebraska, 262 U.S. 390, 400–403, 43 S.Ct. 625, 627–628, 67 L.Ed. 1042.

Attendance at the public schools has never been compulsory; parents remain morally and constitutionally free to choose the academic environment in which they wish their children to be educated. The relationship of the Establishment Clause of the First Amendment to the public school system is preeminently that of reserving such a choice to the individual parent, rather than vesting it in the majority of voters of each State or school district. The choice which is thus preserved is between a public secular education with its uniquely democratic values, and some form of private or sectarian education, which offers values of its own. In my judgment the First Amendment forbids the State to inhibit that freedom of choice by diminishing the attractiveness of either alternative—either by restricting the liberty of the private schools to inculcate whatever values they wish, or by jeopardizing the freedom of the public schools from private or sectarian pressures. The choice between these very different forms of education is one—very much like the choice of whether or not to worship—which our Constitution leaves to the individual parent. It is no proper function of the state or local government to influence or restrict that election. The lesson of history—drawn more from the experiences of other countries than from our own—is that a system of free public education forfeits its unique contribution to the growth of democratic citizenship when that choice ceases to be freely available to each parent.

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II.

The exposition by this Court of the religious guarantees of the First Amendment has consistently reflected and reaffirmed the concerns which impelled the Framers to write those guarantees into the Constitution. It would be neither possible nor appropriate to review here the entire course of our decisions on religious questions. There emerge from those decisions, however, three principles of particular relevance to the issue presented by the cases at bar, and some attention to those decisions is therefore appropriate.

First. One line of decisions derives from contests for control of a church property or other internal ecclesiastical disputes. This line has settled the proposition that in order to give effect to the First Amendment's purpose of requiring on the part of all organs of government a strict neutrality toward theological questions, courts should not undertake to decide such questions. These principles were first expounded in the case of Watson v. Jones, 13 Wall. 679, 20 L.Ed. 666, which declared that judicial intervention in such a controversy would open up "the whole subject of the doctrinal theology, the usages and customs, the written laws, and fundamental organization of every religious denomination * * *." 13 Wall., at 733. Courts above all must be neutral, for "[t]he law knows no heresy, and is committed to the support of no

dogma, the establishment of no sect." [9] 13 Wall., at 728. This principle has recently

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been reaffirmed in Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 73 S.Ct. 143, 97 L.Ed. 120; and Kreshik v. St. Nicholas Cathedral, 363 U.S. 190, 80 S.Ct. 1037, 4 L.Ed.2d 1140.

The mandate of judicial neutrality in theological controversies met its severest test in United States v. Ballard, 322 U.S. 78, 64 S.Ct. 882, 88 L.Ed. 1148. That decision put in sharp relief certain principles which bear directly upon the questions presented in these cases. Ballard was indicted for fraudulent use of the mails in the dissemination of religious literature. He requested that the trial court submit to the jury the question of the truthfulness of the religious views he championed. The requested charge was refused, and we upheld that refusal, reasoning that the First Amendment foreclosed any judicial inquiry into the truth or falsity of the defendant's religious beliefs. We said: "Man's relation to his God was made no concern of the state. He was granted the right to worship as he pleased and to answer to no man for the verity of his religious views." "Men may believe what they cannot

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prove. They may not be put to the proof of their religious doctrines or beliefs. * * * Many take their gospel from the New Testament. But it would hardly be supposed that they could be tried before a jury charged with the duty of determining whether those teachings contained false representations." 322 U.S., at 86–87, 64 S.Ct., at 886–887.

The dilemma presented by the case was severe. While the alleged truthfulness of *nonreligious* publications could ordinarily have been submitted to the jury, Ballard was deprived of that defense only because the First Amendment forbids governmental inquiry into the verity of *religious* beliefs. In dissent Mr. Justice Jackson expressed the concern that under this construction of the First Amendment "[p]rosecutions of this character easily could degenerate into religious persecution." 322 U.S., at 95, 64 S.Ct., at 890. The case shows how elusive is the line which enforces the Amendment's injunction of strict neutrality, while manifesting no official hostility toward religion—a line which must be considered in the cases now before us.[10] Some might view the result of the Ballard case as a manifestation of hos-

9. See Comment, The Power of Courts Over the Internal Affairs of Religious Groups, 43 Calif.L.Rev. 322 (1955); Comment, Judicial Intervention in Disputes Within Independent Church Bodies, 54 Mich.L.Rev. 102 (1955); Note, Judicial Intervention in Disputes Over the Use of Church Property, 75 Harv.L.Rev. 1142 (1962). Compare Vidal v. Girard's Executors, 2 How. 127, 11 L.Ed. 205. The principle of judicial nonintervention in essentially religious disputes appears to have been reflected in the decisions of several state courts declining to enforce essentially private agreements concerning the religious education and worship of children of separated or divorced parents. See, e. g., Hackett v. Hackett, Ohio App., 150 N.E.2d 431; Stanton v. Stanton, 213 Ga. 545, 100 S.E.2d 289, 66 A.L.R.2d 1401; Friedman, The Parental Right to Control the Religious Education of a Child, 29 Harv.L.Rev. 485 (1916); 72 Harv.L.Rev. 372 (1958); Note, 10 West.Res.L.Rev. 171 (1959).

Governmental nonintervention in religious affairs and institutions seems assured by Article 26 of the Constitution of India, which provides:

"Subject to public order, morality and health, every religious denomination or any section thereof shall have the right—

"(a) to establish and maintain institutions for religious and charitable purposes;

"(b) to manage its own affairs in matters of religion;

"(c) to own and acquire movable and immovable property; and

"(d) to administer such property in accordance with law." See 1 Chaudhri, Constitutional Rights and Limitations (1955), 875. This Article does not, however, appear to have completely foreclosed judicial inquiry into the merits of intradenominational disputes. See Gledhill, Fundamental Rights in India (1955), 101–102.

10. For a discussion of the difficulties inherent in the Ballard case, see Kurland,

tility—in that the conviction stood because the defense could not be raised. To others it

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might represent merely strict adherence to the principle of neutrality already expounded in the cases involving doctrinal disputes. Inevitably, insistence upon neutrality, vital as it surely is for untrammeled religious liberty, may appear to border upon religious hostility. But in the long view the independence of both church and state in their respective spheres will be better served by close adherence to the neutrality principle. If the choice is often difficult, the difficulty is endemic to issues implicating the religious guarantees of the First Amendment. Freedom of religion will be seriously jeopardized if we admit exceptions for no better reason than the difficulty of delineating hostility from neutrality in the closest cases.

Second. It is only recently that our decisions have dealt with the question whether issues arising under the Establishment Clause may be isolated from problems implicating the Free Exercise Clause. Everson v. Board of Education, 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711, is in my view the first of our decisions which treats a problem of asserted unconstitutional involvement as raising questions purely under the Establishment Clause. A scrutiny of several earlier decisions said by some to have etched the contours of the clause shows that such cases neither raised nor decided any constitutional issues under the First Amendment. Bradfield v. Roberts, 175 U.S. 291, 20 S.Ct. 121, 44 L.Ed. 168, for example, involved challenges to a federal grant to a hospital administered by a Roman Catholic order. The Court rejected the claim for lack of evidence that any sectarian influence changed its character as a secular institution chartered as such by the Congress.[11]

Quick Bear v. Leupp, 210 U.S. 50, 28 S.Ct. 690, 52 L.Ed. 954, is also illustrative. The immediate question there was one of statutory construction, although the issue had originally involved the

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constitutionality of the use of federal funds to support sectarian education on Indian reservations. Congress had already prohibited federal grants for that purpose, thereby removing the broader issue, leaving only the question whether the statute authorized the appropriation for religious teaching of Treaty funds held by the Government in trust for the Indians. Since these were the Indians' own funds, the Court held only that the Indians might direct their use for such educational purposes as they chose, and that the administration by the Treasury of the disbursement of the funds did not inject into the case any issue of the propriety of the use of federal moneys.[12]

Religion and the Law (1962), 75–79. This Court eventually reversed the convictions on the quite unrelated ground that women had been systematically excluded from the jury, Ballard v. United States, 329 U.S. 187, 67 S.Ct. 261, 91 L.Ed. 181. For discussions of the difficulties in interpreting and applying the First Amendment so as to foster the objective of neutrality without hostility, see e. g., Katz, Freedom of Religion and State Neutrality, 20 U. of Chi.L.Rev. 426, 438 (1953); Kauper, Church, State, and Freedom: A Review, 52 Mich.L.Rev. 829, 842 (1954). Compare, for an interesting apparent attempt to avoid the Ballard problem at the international level, Article 3 of the Multilateral Treaty between the United States and certain American Republics, which provides that extradition will not be granted, *inter alia*, when "the offense is * * * directed against religion." Blakely, American State Papers and Related Documents on Freedom in Religion (4th rev. ed. 1949), 316.

11. See Kurland, Religion and the Law (1962), 32–34.

12. Compare the treatment of an apparently very similar problem in Article 28 of the Constitution of India:

"(1) No religious instruction shall be provided in any educational institution wholly maintained out of State funds.

"(2) Nothing in clause (1) shall apply to an educational institution which is administered by the State but has been established under any endowment or trust which requires that religious instruction shall be imparted in such institution." 1

Indeed, the Court expressly approved the reasoning of the Court of Appeals that to deny the Indians the right to spend their own moneys for religious purposes of their choice might well infringe the free exercise of their religion: "it seems inconceivable that Congress [should] have intended to prohibit them from receiving religious education at their own cost if they so desired it * * *." 210 U.S., at 82, 28 S.Ct., at 700. This case forecast, however, an increasingly troublesome First Amendment paradox: that the logical interrelationship between the Establishment and Free Exercise Clauses may produce situations where an injunction against an apparent establishment must be withheld in order to avoid infringement of rights of free exercise. That paradox was not squarely presented in Quick Bear, but the care taken by the Court

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to avoid a constitutional confrontation discloses an awareness of possible conflicts between the two clauses. I shall come back to this problem later, infra, pp. 1610–1612.

A third case in this group is Cochran v. Louisiana State Board, 281 U.S. 370, 50 S.Ct. 335, 74 L.Ed. 913, which involved a challenge to a state statute providing public funds to support a loan of free textbooks to pupils of both public and private schools. The constitutional issues in this Court extended no further than the claim that this program amounted to a taking of private property for nonpublic use. The Court rejected the claim on the ground that no private use of property was involved; "* * * we cannot doubt that the taxing power of the State is exerted for a public purpose." 281 U.S., at 375, 50 S.Ct., at 336. The case therefore raised no issue under the First Amendment.[13]

In Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070, a Catholic parochial school and a private but nonsectarian military academy challenged a state law requiring all children between certain ages to attend the public schools. This Court held the law invalid as an arbitrary and unreasonable interference both with the rights of the schools and with the liberty of the parents of the children who attended them. The due process guarantee of the Fourteenth Amendment "excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only." 268 U. S., at 535, 45 S.Ct., at 573. While one of the plaintiffs was indeed a parochial school, the case obviously decided no First Amendment question but recognized only the constitutional right to establish and patronize private schools—including parochial schools—which meet the state's reasonable minimum curricular requirements.

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Third. It is true, as the Court says, that the "two clauses [Establishment and Free Exercise] may overlap." Because of the overlap, however, our decisions under the Free Exercise Clause bear considerable relevance to the problem now before us, and should be briefly reviewed. The early free exercise cases generally involved the objections of religious minorities to the application to them of general nonreligious legislation governing conduct. Reynolds v. United States, 98 U.S. 145, 25 L.Ed. 244, involved the claim that a belief in the sanctity of plural marriage precluded the conviction of members of a particular sect under nondiscriminatory legislation against such marriage. The Court rejected the claim, saying:

"Laws are made for the government of actions, and while they cannot interfere with mere religious beliefs and opinions, they may with prac-

Chaudhri, Constitutional Rights and Limitations (1955), 875–876, 939.

13. See Kurland, Religion and the Law (1962), 28–31: Fellman, Separation of Church and State in the United States: A Summary View, 1950 Wis.L.Rev. 427, 442.

tices. * * * Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances." [14] 98 U.S., at 166–167.

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Davis v. Beason, 133 U.S. 333, 10 S.Ct. 299, 33 L.Ed. 637, similarly involved the claim that the First Amendment insulated from civil punishment certain practices inspired or motivated by religious beliefs. The claim was easily rejected: "It was never intended or supposed that the amendment could be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order, and morals of society." 133 U.S., at 342, 10 S.Ct., at 300. See also Mormon Church v. United States, 136 U.S. 1, 10 S.Ct. 792, 34 L.Ed. 481; Jacobson v. Massachusetts, 197 U.S. 11, 25 S.Ct. 358, 49 L.Ed. 643; Prince v. Massachusetts, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645; Cleveland v. United States, 329 U.S. 14, 67 S.Ct. 13, 91 L.Ed. 12.

But we must not confuse the issue of governmental power to regulate or prohibit conduct *motivated by religious beliefs* with the quite different problem of governmental authority to compel behavior *offensive to religious principles*. In Hamilton v. Regents of the University of California, 293 U.S. 245, 55 S.Ct. 197, 79 L.Ed. 343, the question was that of the power of a State to compel students at the State University to participate in military training instruction against their religious convictions. The validity of the statute was sustained against claims based upon the First Amendment. But the decision rested on a very narrow principle: since there was neither a constitutional right nor a legal obligation to attend the State University, the obligation to participate in military training courses,

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reflecting a legitimate state interest, might properly be imposed upon those who chose to attend. Although the rights protected by the First and Fourteenth Amendments were presumed to include "the right to entertain the beliefs, to adhere to the principles and to teach the doctrines on which these students base their objections to the order prescribing military training," those Amendments were construed not to free such students from the military training obligations if they chose to attend the University. Justices Brandeis, Cardozo and Stone, concurring separately, agreed that the requirement infringed no constitutionally protected liberties. They added, however, that the case presented no question

14. This distinction, implicit in the First Amendment, had been made explicit in the original Virginia Bill of Rights provision that "all men should enjoy the fullest toleration in the exercise of religion according to the dictates of conscience, unpunished and unrestrained by the magistrate, unless under color of religion any man disturb the peace, the happiness, or safety of society." See Cobb, The Rise of Religious Liberty in America (1902), 491. Concerning various legislative limitations and restraints upon religiously motivated behavior which endangers or offends society, see Manwaring, Render Unto Caesar: The Flag-Salute Controversy (1962), 41–52. Various courts have applied this principle to proscribe certain religious exercises or activities which were thought to threaten the safety or morals of the participants or the rest of the community, e. g., State v. Massey, 229 N.C. 734, 51 S.E.2d 179; Harden v. State, 188 Tenn. 17, 216 S.W.2d 708; Lawson v. Commonwealth, 291 Ky. 437, 164 S.W.2d 972; cf. Sweeney v. Webb, 33 Tex.Civ. App. 324, 76 S.W. 766.

That the principle of these cases, and the distinction between belief and behavior, are susceptible of perverse application, may be suggested by Oliver Cromwell's mandate to the besieged Catholic community in Ireland:

"As to freedom of conscience, I meddle with no man's conscience; but if you mean by that, liberty to celebrate the Mass, I would have you understand that in no place where the power of the Parliament of England prevails shall that be permitted." Quoted in Hook, The Paradoxes of Freedom (1962), 23.

under the Establishment Clause. The military instruction program was not an establishment since it in no way involved "instruction in the practice or tenets of a religion." 293 U.S., at 266, 55 S.Ct., at 206. Since the only question was one of free exercise, they concluded, like the majority, that the strong state interest in training a citizen militia justified the restraints imposed, at least so long as attendance at the University was voluntary.[15]

Hamilton has not been overruled, although United States v. Schwimmer, 279 U.S. 644, 49 S.Ct. 448, 73 L.Ed. 889, and United States v. Macintosh, 283 U.S. 605, 51 S.Ct. 570, 75 L.Ed. 1302, upon which the Court in Hamilton relied, have since been overruled by Girouard v. United States, 328 U.S. 61, 66 S.Ct. 826, 90 L.Ed. 1084. But if Hamilton retains any vitality with respect to higher education, we recognized its inapplicability to cognate questions in the public primary and secondary schools when we held in West Virginia Board of Education v. Barnette, supra, that a State had no power to expel from public schools students who refused on religious grounds to comply with a daily flag

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salute requirement. Of course, such a requirement was no more a law "respecting an establishment of religion" than the California law compelling the college students to take military training. The Barnette plaintiffs, moreover, did not ask that the whole exercise be enjoined, but only that an excuse or exemption be provided for those students whose religious beliefs forbade them to participate in the ceremony. The key to the holding that such a requirement abridged rights of free exercise lay in the fact that attendance at school was not voluntary but compulsory. The Court said:

> "This issue is not prejudiced by the Court's previous holding that where a State, without compelling attendance, extends college facilities to pupils who voluntarily enroll, it may prescribe military training as part of the course without offense to the Constitution. * * * Hamilton v. Regents, 293 U.S. 245, 55 S.Ct. 197, 79 L.Ed. 343. In the present case attendance is not optional." 319 U.S., at 631–632, 63 S.Ct., at 1182.

The Barnette decision made another significant point. The Court held that the State must make participation in the exercise voluntary for all students and not alone for those who found participation obnoxious on religious grounds. In short, there was simply no need to "inquire whether non-conformist beliefs will exempt from the duty to salute" because the Court found no state "power to make the salute a legal duty." 319 U.S., at 635, 63 S.Ct., at 1184.

The distinctions between Hamilton and Barnette are, I think, crucial to the resolution of the cases before us. The different results of those cases are attributable only in part to a difference in the strength of the particular state interests which the respective statutes were designed to serve. Far more significant is the fact that Hamilton dealt with the voluntary attendance at college of young adults, while Barnette involved the compelled attendance

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of young children at elementary and secondary schools.[16] This distinction warrants a difference in constitutional results. And it is with the involuntary attendance of young school

15. With respect to the decision in Hamilton v. Regents, compare two recent comments: Kurland, Religion and the Law (1962), 40; and French, Comment, Unconstitutional Conditions: An Analysis, 50 Geo.L.J. 234, 246 (1961).

16. See generally as to the background and history of the Barnette case, Manwaring, Render Unto Caesar: The Flag-Salute Controversy (1962), especially at 252–253. Compare, for the interesting treatment of a problem similar to that of Barnette, in a nonconstitutional context, Chabot v. Les Commissaires D'Ecoles de Lamorandière, [1957] Que.B.R. 707, noted in 4 McGill L.J. 268 (1958).

children that we are exclusively concerned in the cases now before the Court.

III.

No one questions that the Framers of the First Amendment intended to restrict exclusively the powers of the Federal Government.[17] Whatever limitations that Amendment now imposes upon the States derive from the Fourteenth Amendment. The process of absorption of the religious guarantees of the First Amendment as protections against the States under the Fourteenth Amendment began with the Free Exercise Clause. In 1923 the Court held that the protections of the Fourteenth included at least a person's freedom "to worship God according to the dictates of his own conscience * * *" [18]

Meyer v. Nebraska, 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed. 1042. See also Hamilton v. Regents, supra, 293 U.S., at 262, 55 S.Ct., at 204. Cantwell v. Connecticut, 310 U.S. 296, 60 S.Ct. 900, 84 L. Ed. 1213, completed in 1940 the process of absorption

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of the Free Exercise Clause and recognized its dual aspect: the Court affirmed freedom of belief as an absolute liberty, but recognized that conduct, while it may also be comprehended by the Free Exercise Clause, "remains subject to regulation for the protection of society." 310 U.S., at 303–304, 60 S.Ct., at 903. This was a distinction already drawn by Reynolds v. United States, supra. From the beginning this Court has recognized that while government may regulate the behavioral manifestations of religious beliefs, it may not interfere at all with the beliefs themselves.

The absorption of the Establishment Clause has, however, come later and by a route less easily charted. It has been suggested, with some support in history, that absorption of the First Amendment's ban against congressional legislation "respecting an establishment of religion" is conceptually impossible because the Framers meant the Establishment Clause also to foreclose any attempt by Congress to disestablish the existing official state churches.[19] Whether or not such was the

17. See Barron, for Use of Tiernan v. Baltimore, 7 Pet. 243, 8 L.Ed. 672; Permoli v. New Orleans, 3 How. 589, 609, 11 L.Ed. 739; cf. Fox v. Ohio, 5 How. 410, 434–435, 12 L.Ed. 213; Withers v. Buckley, 20 How. 84, 89–91, 15 L.Ed. 816. As early as 1825, however, at least one commentator argued that the guarantees of the Bill of Rights, excepting only those of the First and Seventh Amendments, were meant to limit the powers of the States. Rawle, A View of the Constitution of the United States of America (1825), 120–130.

18. In addition to the statement of this Court in Meyer, at least one state court assumed as early as 1921 that claims of abridgment of the free exercise of religion in the public schools must be tested under the guarantees of the First Amendment as well as those of the state constitution. Hardwick v. Board of School Trustees, 54 Cal.App. 696, 704–705, 205 P. 49, 52. See Louisell and Jackson, Religion, Theology, and Public Higher Education, 50 Cal.L.Rev. 751, 772 (1962). Even before the Fourteenth Amendment, New York State enacted a general common school law in 1844 which provided that no religious instruction should be given which could be construed to violate the rights of conscience "as secured by the constitution of this state and the United States." N.Y.Laws, 1844, c. 320, § 12.

19. See, e. g., Snee, Religious Disestablishment and the Fourteenth Amendment, 1954 Wash.U.L.Q. 371, 373–394; Kruse, The Historical Meaning and Judicial Construction of the Establishment of Religion Clause of the First Amendment, 2 Washburn L.J. 65, 84–85, 127–130 (1962); Katz, Religion and American Constitutions, Address at Northwestern University Law School, March 20, 1963, pp. 6–7. But see the debate in the Constitutional Convention over the question whether it was necessary or advisable to include among the enumerated powers of the Congress a power "to establish an University, in which no preferences or distinctions should be allowed on account of religion." At least one delegate thought such an explicit delegation "is not necessary," for "[t]he exclusive power at the Seat of Government, will reach the object." The proposal was defeated by

understanding of the Framers and whether such a purpose would have inhibited the absorption of the Establishment Clause at the threshold of the Nineteenth Century are questions not dispositive of our present inquiry. For it is

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clear on the record of history that the last of the formal state establishments was dissolved more than three decades before the Fourteenth Amendment was ratified, and thus the problem of protecting official state churches from federal encroachments could hardly have been any concern of those who framed the post-Civil War Amendments.[20] Any such objective of the First Amendment, having become historical anachronism by 1868, cannot be thought to have deterred the absorption of the Establishment Clause to any greater degree than it would, for example, have deterred the absorption of the Free Exercise Clause. That no organ of the Federal Government possessed in 1791 any power to restrain the interference of the States in religious matters is indisputable. See Permoli v. New Orleans, 3 How. 589, 11 L.Ed. 739. It is equally plain, on the other hand, that the Fourteenth Amendment created a panoply of new federal rights for the protection of citizens of the various States. And among those rights was freedom from such state governmental involvement in the affairs of religion as the Establishment Clause had originally foreclosed on the part of Congress.

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It has also been suggested that the "liberty" guaranteed by the Fourteenth Amendment logically cannot absorb the Establishment Clause because that clause is not one of the provisions of the Bill of Rights which in terms protects a "freedom" of the individual. See Corwin, A Constitution of Powers in a Secular State (1951), 113–116. The fallacy in this contention, I think, is that it underestimates the role of the Establishment Clause as a coguarantor, with the Free Exercise Clause, of religious liberty. The Framers did not entrust the liberty of religious beliefs to either clause alone. The Free Exercise Clause "was not to be the full extent of the Amendment's guarantee of freedom from governmental intrusion in matters of faith." McGowan v. Maryland, supra, 366 U.S., at 464, 81 S.Ct., at 1156 (opinion of Frankfurter, J.).

Finally, it has been contended that absorption of the Establishment Clause is precluded by the absence of any intention on the part of the Framers of the Fourteenth Amendment to circumscribe the residual powers of the States to aid religious activities and institutions in ways which fell short of formal establishments.[21] That argument relies in part upon the express terms of the

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abortive

only two votes. 2 Farrand, Records of the Federal Convention of 1787 (1911), 616.

20. The last formal establishment, that of Massachusetts, was dissolved in 1833. The process of disestablishment in that and other States is described in Cobb, The Rise of Religious Liberty in America (1902), c. X; Sweet, The Story of Religion in America (1950), c. XIII. The greater relevance of conditions existing at the time of adoption of the Fourteenth Amendment is suggested in Note, State Sunday Laws and the Religious Guarantees of the Federal Constitution, 73 Harv. L.Rev. 729, 739, n. 79 (1960).

21. See Corwin, A Constitution of Powers in a Secular State (1951), 111–114; Fairman and Morrison, Does the Fourteenth Amendment Incorporate the Bill of Rights? 2 Stan.L.Rev. 5 (1949); Meyer, Comment, The Blaine Amendment and the Bill of Rights, 64 Harv.L.Rev. 939 (1951); Howe, Religion and Race in Public Education, 8 Buffalo L.Rev. 242, 245–247 (1959). Cf. Cooley, Principles of Constitutional Law (2d ed. 1891), 213–214. Compare Professor Freund's comment:

"Looking back, it is hard to see how the Court could have done otherwise, how it could have persisted in accepting freedom of contract as a guaranteed liberty without giving equal status to freedom of press and speech, assembly, and religious observance. What does not seem so inevitable is the inclusion within the Fourteenth Amendment of the concept of nonestablishment of religion in the sense of

Blaine Amendment—proposed several years after the adoption of the Fourteenth Amendment—which would have added to the First Amendment a provision that "[n]o State shall make any law respecting an establishment of religion * * *." Such a restriction would have been superfluous, it is said, if the Fourteenth Amendment had already made the Establishment Clause binding upon the States.

The argument proves too much, for the Fourteenth Amendment's protection of the free exercise of religion can hardly be questioned; yet the Blaine Amendment would also have added an explicit protection against state laws abridging that liberty.[22] Even if we assume that the draftsmen of the Fourteenth Amendment saw no immediate connection between its protections against state action infringing personal liberty and the guarantees of the First Amendment, it is certainly too late in the day to suggest that their assumed inattention to the question dilutes the force of these constitutional guarantees in their application to the States.[23] It is enough to conclude

forbidding nondiscriminatory aid to religion, where there is no interference with freedom of religious exercise." Freund, The Supreme Court of the United States (1961), 58–59.

22. The Blaine Amendment, 4 Cong.Rec. 5580, included also a more explicit provision that "no money raised by taxation in any State for the support of public schools or derived from any public fund therefor, nor any public lands devoted thereto, shall ever be under the control of any religious sect or denomination * * *." The Amendment passed the House but failed to obtain the requisite two-thirds vote in the Senate. See 4 Cong.Rec. 5595. The prohibition which the Blaine Amendment would have engrafted onto the American Constitution has been incorporated in the constitutions of other nations; compare Article 28(1) of the Constitution of India ("No religious instruction shall be provided in any educational institution wholly maintained out of State funds"); Article XX of the Constitution of Japan ("* * * the State and its organs shall refrain from religious education or any other religious activity"). See 1 Chaudhri, Constitutional Rights and Limitations (1955), 875, 876.

23. Three years after the adoption of the Fourteenth Amendment, Mr. Justice Bradley wrote a letter expressing his views on a proposed constitutional amendment designed to acknowledge the dependence of the Nation upon God, and to recognize the Bible as the foundation of its laws and the supreme ruler of its conduct:

"I have never been able to see the necessity or expediency of the movement for obtaining such an amendment. The Constitution was evidently framed and adopted by the people of the United States with the fixed determination to allow absolute religious freedom and equality, and to avoid all appearance even of a State religion, or a State endorsement of any particular creed or religious sect. * * * And after the Constitution in its original form was adopted, the people made haste to secure an amendment that Congress shall make no law respecting an establishment or religion, or prohibiting the free exercise thereof. This shows the earnest desire of our Revolutionary fathers that religion should be left to the free and voluntary action of the people themselves. I do not regard it as manifesting any hostility to religion, but as showing a fixed determination to leave the people entirely free on the subject.

"And it seems to me that our fathers were wise; that the great voluntary system of this country is quite as favorable to the promotion of real religion as the systems of governmental protection and patronage have been in other countries. And whilst I do not understand that the association which you represent desire to invoke any governmental interference, still the amendment sought is a step in that direction which our fathers (quite as good Christians as ourselves) thought it wise not to take. In this country they thought they had settled one thing at least, that it is not the province of government to teach theology.

"* * * Religion, as the basis and support of civil government, must reside, not in the written Constitution, but in the people themselves. And we cannot legislate religion into the people. It must be infused by gentler and wiser methods." Miscellaneous Writings of Joseph P. Bradley (1901), 357–359.

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that the religious liberty embodied in the Fourteenth Amendment would not be viable if the Constitution were interpreted to forbid only establishments ordained by Congress.[24]

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The issue of what particular activities the Establishment Clause forbids the States to undertake is our more immediate concern. In Everson v. Board of Education of Ewing Tp., 330 U.S. 1, 15–16, 67 S.Ct. 504, 91 L.Ed. 711, a careful study of the relevant history led the Court to the view, consistently recognized in decisions since Everson, that the Establishment Clause embodied the Framers' conclusion that government and religion have discreet interests which are mutually best served when each avoids too close a proximity to the other. It is not only the nonbeliever who fears the injection of sectarian doctrines and controversies into the civil polity, but in as high degree it is the devout believer who fears the secularization of a creed which becomes too deeply involved with and dependent upon the government.[25] It

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has rightly been said of the history of the Establishment Clause that "our tradition of civil liberty rests not only on the secularism of a Thomas Jefferson but also on the fervent sectarianism * * * of a Roger Williams." Freund, The Supreme Court of the United States (1961), 84.

Our decisions on questions of religious education or exercises in the public schools have consistently reflected this dual aspect of the Establishment Clause. Engel v. Vitale unmistakably has its roots in three earlier cases which, on cognate issues, shaped the contours of the Establishment Clause. First, in Everson the Court held that reimbursement by the town of parents for the cost of transporting their children by public carrier to

For a later phase of the controversy over such a constitutional amendment as that which Justice Bradley opposed, see Finlator, Christ in Congress, 4 J.Church and State 205 (1962).

24. There is no doubt that, whatever "establishment" may have meant to the Framers of the First Amendment in 1791, the draftsmen of the Fourteenth Amendment three quarters of a century later understood the Establishment Clause to foreclose many incidental forms of governmental aid to religion which fell far short of the creation or support of an official church. The Report of a Senate Committee as early as 1853, for example, contained this view of the Establishment Clause:

"If Congress has passed, or should pass, any law which, fairly construed, has in any degree introduced, or should attempt to introduce, in favor of any church, or ecclesiastical association, or system of religious faith, all or any one of these obnoxious particulars—endowment at the public expense, peculiar privileges to its members, or disadvantages or penalties upon those who should reject its doctrines or belong to other communions—such law would be a 'law respecting an establishment of religion,' and, therefore, in violation of the constitution." S.Rep. No. 376, 32d Cong., 2d Sess. 1–2.

Compare Thomas M. Cooley's exposition in the year in which the Fourteenth Amendment was ratified:

"Those things which are not lawful under any of the American constitutions may be stated thus:—

"1. Any law respecting an establishment of religion. * * *

"2. Compulsory support, by taxation or otherwise, of religious instruction. Not only is no one denomination to be favored at the expense of the rest, but all support of religious instruction must be entirely voluntary." Cooley, Constitutional Limitations (1st ed. 1868), 469.

25. Compare, e. g., Miller, Roger Williams: His Contribution to the American Tradition (1953), 83, with Madison, Memorial and Remonstrance Against Religious Assessments, reprinted as an Appendix to the dissenting opinion of Mr. Justice Rutledge, Everson v. Board of Education, supra, 330 U.S. at 63–72, 67 S.Ct. at 534–538. See also Cahn, On Government and Prayer, 37 N.Y.U.L.Rev. 981, 982–985 (1962); Jefferson's Bill for Establishing Religious Freedom, in Padover, The Complete Jefferson (1943), 946–947; Moulton and Myers, Report on Appointing Chaplains to the Legislature of New York, in Blau, Cornerstones of Religious Freedom in America (1949), 141–156; Bury, A History of Freedom of Thought (2d ed. 1952), 75–76.

parochial (as well as public and private nonsectarian) schools did not offend the Establishment Clause. Such reimbursement, by easing the financial burden upon Catholic parents, may indirectly have fostered the operation of the Catholic schools, and may thereby indirectly have facilitated the teaching of Catholic principles, thus serving ultimately a religious goal. But this form of governmental assistance was difficult to distinguish from myriad other incidental if not insignificant government benefits enjoyed by religious institutions—fire and police protection, tax exemptions, and the pavement of streets and sidewalks, for example. "The State contributes no money to the schools. It does not support them. Its legislation, as applied, does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from

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accredited schools." 330 U.S., at 18, 67 S.Ct. at 513. Yet even this form of assistance was thought by four Justices of the Everson Court to be barred by the Establishment Clause because too perilously close to that public support of religion forbidden by the First Amendment.

The other two cases, Illinois ex rel. McCollum v. Board of Education, 333 U. S. 203, 68 S.Ct. 461, 92 L.Ed. 648, and Zorach v. Clauson, 343 U.S. 306, 72 S.Ct. 679, 96 L.Ed. 954, can best be considered together. Both involved programs of released time for religious instruction of public school students. I reject the suggestion that Zorach overruled McCollum in silence.[26] The distinction which the Court drew in Zorach between the two cases is, in my view, faithful to the function of the Establishment Clause.

I should first note, however, that McCollum and Zorach do not seem to me distinguishable in terms of the free exercise claims advanced in both cases.[27] The nonparticipant in the McCollum program was given secular instruction in a separate room during the times his classmates had religious lessons; the nonparticipant in any Zorach program also received secular instruction, while his classmates repaired to a place outside the school for religious instruction.

The crucial difference, I think, was that the McCollum program offended the Establishment Clause while the Zorach program did not. This was not, in my view, because of the difference in public expenditures involved. True, the McCollum program involved the regular use of school facilities, classrooms, heat and light and time from the regular school day—even though the actual

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incremental cost may have been negligible. All religious instruction under the Zorach program, by contrast, was carried on entirely off the school premises, and the teacher's part was simply to facilitate the children's release to the churches. The deeper difference was that the McCollum program placed the religious instructor in the public school classroom in precisely the position of authority held by the regular teachers of secular subjects, while the Zorach program did not.[28] The McCollum program,

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in lending to the support of sectarian instruction all the au-

26. See, e. g., Spicer, The Supreme Court and Fundamental Freedoms (1959), 83–84; Kauper, Church, State, and Freedom: A Review, 52 Mich.L.Rev. 829, 839 (1954); Reed, Church-State and the Zorach Case, 27 Notre Dame Lawyer 529, 539–541 (1952).

27. See 343 U.S., at 321–322, 72 S.Ct. at 687–688 (Frankfurter, J., dissenting); Kurland, Religion and the Law (1962), 89. I recognize that there is a question whether in Zorach the free exercise claims asserted were in fact proved. 343 U.S., at 311, 72 S.Ct., at 682.

28. Mr. Justice Frankfurter described the effects of the McCollum program thus:

"Religious education so conducted on school time and property is patently woven into the working scheme of the school. The Champaign arrangement thus presents powerful elements of inherent pressure by the school system in the interest of religious sects. * * * As a result, the public school system of

thority of the governmentally operated public school system, brought government and religion into that proximity which the Establishment Clause forbids. To be sure, a religious teacher presumably commands substantial respect and merits attention in his own right. But the Constitution does not permit that prestige and capacity for influence to be augmented by investiture of all the symbols of authority at the command of the lay teacher for the enhancement of secular instruction.

More recent decisions have further etched the contours of Establishment. In the Sunday Law Cases, we found in state laws compelling a uniform day of rest from worldly labor no violation of the Establishment Clause (McGowan v. Maryland, 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393). The basic

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ground of our decision was that, granted the Sunday Laws were first enacted for religious ends, they were continued in force for reasons wholly secular, namely, to provide a universal day of rest and ensure the health and tranquillity of the community. In other words, government may originally have decreed a Sunday day of rest for the impermissible purpose of supporting religion but abandoned that purpose and retained the laws for

Champaign actively furthers inculcation in the religious tenets of some faiths, and in the process sharpens the consciousness of religious differences at least among some of the children committed to its care." 333 U.S., at 227–228, 68 S.Ct. at 473.

For similar reasons some state courts have enjoined the public schools from employing or accepting the services of members of religious orders even in the teaching of secular subjects, e. g., Zellers v. Huff, 55 N.M. 501, 236 P.2d 949; Berghorn v. Reorganized School Dist. No. 8, 364 Mo. 121, 260 S.W.2d 573; compare ruling of Texas Commissioner of Education, Jan. 25, 1961, in 63 American Jewish Yearbook (1962), 188. Over a half century ago a New York court sustained a school board's exclusion from the public schools of teachers wearing religious garb on similar grounds:

"Then all through the school hours these teachers * * * were before the children as object lessons of the order and church of which they were members. It is within our common observation that young children * * * are very susceptible to the influence of their teachers and of the kind of object lessons continually before them in schools conducted under these circumstances and with these surroundings." O'Connor v. Hendrick, 109 App.Div. 361, 371–372, 96 N.Y.S. 161, 169. See also Commonwealth v. Herr, 229 Pa. 132, 78 A. 68; Comment, Religious Garb in the Public Schools—A Study in Conflicting Liberties, 22 U. of Chi.L.Rev. 888 (1955).

Also apposite are decisions of several courts which have enjoined the use of parochial schools as part of the public school system, Harfst v. Hoegen, 349 Mo. 808, 163 S.W.2d 609, 141 A.L.R. 1136; or have invalidated programs for the distribution in public school classrooms of Gideon Bibles, Brown v. Orange County Board of Public Instruction, 128 So.2d 181 (Fla.App.); Tudor v. Board of Education, 14 N.J. 31, 100 A.2d 857, 45 A.L.R.2d 729. See Note, The First Amendment and Distribution of Religious Literature in the Public Schools, 41 Va.L.Rev. 789, 803–806 (1955). In Tudor, the court stressed the role of the public schools in the Bible program:

"* * * the public school machinery is used to bring about the distribution of these Bibles to the children * * *. In the eyes of the pupils and their parents the board of education has placed its stamp of approval upon this distribution and, in fact, upon the Gideon Bible itself. * * * This is more than mere 'accommodation' of religion permitted in the Zorach case. The school's part in this distribution is an active one and cannot be sustained on the basis of a mere assistance to religion." 14 N.J., at 51–52, 100 A.2d, at 868.

The significance of the teacher's authority was recognized by one early state court decision:

"The school being in session, the right to command was vested in the teacher, and the duty of obedience imposed upon the pupils. Under such circumstances a request and a command have the same meaning. A request from one in authority is understood to be a mere euphemism. It is in fact a command in an inoffensive form." State ex rel. Freeman v. Scheve, 65 Neb. 853, 876, 880, 93 N.W. 169, 170.

the permissible purpose of furthering overwhelmingly secular ends.

Such was the evolution of the contours of the Establishment Clause before Engel v. Vitale. There, a year ago, we held that the daily recital of the state-composed Regents' Prayer constituted an establishment of religion because, although the prayer itself revealed no *sectarian* content or purpose, its nature and meaning were quite clearly *religious*. New York, in authorizing its recitation, had not maintained that distance between the public and the religious sectors commanded by the Establishment Clause when it placed the "power, prestige and financial support of government" behind the prayer. In Engel, as in McCollum, it did not matter that the amount of time and expense allocated to the daily recitation was small so long as the exercise itself was manifestly religious. Nor did it matter that few children had complained of the practice, for the measure of the seriousness of a breach of the Establishment Clause has never been thought to be the number of people who complain of it.

We also held two Terms ago in Torcaso v. Watkins, supra, that a State may not constitutionally require an applicant for the office of Notary Public to swear or affirm that he believes in God. The problem of that case was strikingly similar to the issue presented 18 years before in the flag salute case, West Virginia Board of Education v. Barnette, supra. In neither case was there any claim of establishment of religion, but only of infringement of

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the individual's religious liberty —in the one case, that of the nonbeliever who could not attest to a belief in God; in the other, that of the child whose creed forbade him to salute the flag. But Torcaso added a new element not present in Barnette. The Maryland test oath involved an attempt to employ essentially religious (albeit nonsectarian) means to achieve a secular goal to which the means bore no reasonable relationship. No one doubted the State's interest in the integrity of its Notaries Public, but that interest did not warrant the screening of applicants by means of a religious test. The Sunday Law Cases were different in that respect. Even if Sunday Laws retain certain religious vestiges, they are enforced today for essentially secular objectives which cannot be effectively achieved in modern society except by designating Sunday as the universal day of rest. The Court's opinions cited very substantial problems in selecting or enforcing an alternative day of rest. But the teaching of both Torcaso and the Sunday Law Cases is that government may not employ religious means to serve secular interests, however legitimate they may be, at least without the clearest demonstration that nonreligious means will not suffice.[29]

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IV.

I turn now to the cases before us.[30] The religious nature of the exercises here

29. See for other illustrations of the principle that where First Amendment freedoms are or may be affected, government must employ those means which will least inhibit the exercise of constitutional liberties, Lovell v. City of Griffin, 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949; Schneider v. State of New Jersey, 308 U.S. 147, 161, 60 S.Ct. 146, 84 L.Ed. 155; Martin v. City of Struthers, 319 U.S. 141, 63 S.Ct. 862, 87 L.Ed. 1313; Saia v. New York, 334 U.S. 558, 68 S.Ct. 1148, 92 L.Ed. 1574; Shelton v. Tucker, 364 U.S. 479, 488–489, 81 S.Ct. 247, 5 L.Ed.2d 231; Bantam Books, Inc., v. Sullivan, 372 U.S. 58, 66, 69–71, 83 S.Ct. 631, 9 L.Ed.2d 584. See also Note, State Sunday Laws and the Religious Guarantees of the Federal Constitution, 73 Harv.L.Rev. 729, 743–745 (1960); Freund, The Supreme Court of the United States (1961), 86–87; 74 Harv.L.Rev. 613 (1961). And compare Miller v. Cooper, 56 N.M. 355, 244 P.2d 520 (1952), in which a state court permitted the holding of public school commencement exercises in a church building only because no public buildings in the community were adequate to accommodate the ceremony.

30. No question has been raised in these cases concerning the standing of these

challenged seems plain. Unless Engel v. Vitale is to be overruled, or we are to engage in wholly disingenuous distinction, we cannot sustain

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these practices. Daily recital of the Lord's Prayer and the reading of passages of Scripture are quite as clearly breaches of the command of the Establishment Clause as was the daily use of the rather bland Regents' Prayer in the New York public schools. Indeed, I would suppose that, if anything, the Lord's Prayer and the Holy Bible are more clearly sectarian, and the present violations of the First Amendment consequently more serious. But the religious exercises challenged in these cases have a long history. And almost from the beginning, Bible reading and daily prayer in the schools have been the subject of debate, criticism by educators and other public officials and proscription by courts and legislative councils. At the outset, then, we must carefully canvass both aspects of this history.

parents to challenge the religious practices conducted in the schools which their children presently attend. Whatever authority Doremus v. Board of Education of Borough of Hawthorne, 342 U.S. 429, 72 S.Ct. 394, 96 L.Ed. 475, might have on the question of the standing of one not the parent of children affected by the challenged exercises is not before us in these cases. Neither in McCollum nor in Zorach was there any reason to question the standing of the parent-plaintiffs under settled principles of justiciability and jurisdiction, whether or not their complaints alleged pecuniary loss or monetary injury. The free-exercise claims of the parents alleged injury sufficient to give them standing. If, however, the gravamen of the lawsuit were exclusively one of establishment, it might seem illogical to confer standing upon a parent who—though he is concededly in the best position to assert a free-exercise claim—suffers no financial injury, by reason of being a parent, different from that of the ordinary taxpayer, whose standing may be open to question. See Sutherland, Establishment According to Engel, 76 Harv.L.Rev. 25, 41–43 (1962). I would suggest several answers to this conceptual difficulty. First, the parent is surely the person most directly and immediately concerned about and affected by the challenged establishment, and to deny him standing either in his own right or on behalf of his child might effectively foreclose judicial inquiry into serious breaches of the prohibitions of the First Amendment—even though no special monetary injury could be shown. See Schempp v. School District of Abington Township, D.C., 177 F.Supp. 398, 407; Kurland, The Regents' Prayer Case: "Full of Sound and Fury, Signifying * * *," 1962 Supreme Court Review 1, 22. Second, the complaint in every case thus far challenging an establishment has set forth at least a colorable claim of infringement of free exercise. When the complaint includes both claims, and neither is frivolous, it would surely be overtechnical to say that a parent who does not detail the monetary cost of the exercises to him may ask the court to pass only upon the free-exercise claim, however logically the two may be related. Cf. Pierce v. Society of Sisters, supra; Truax v. Raich, 239 U.S. 33, 38–39, 36 S.Ct. 7, 60 L.Ed. 131; NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 458–460, 78 S.Ct. 1163, 2 L.Ed.2d 1488; Bell v. Hood, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939; Bantam Books, Inc., v. Sullivan, 372 U.S. 58, 64, n. 6, 83 S.Ct. 631, 9 L.Ed.2d 584. Finally, the concept of standing is a necessarily flexible one, designed principally to ensure that the plaintiffs have "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions * * *." Baker v. Carr, 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663. It seems to me that even a cursory examination of the complaints in these two cases and the opinions below discloses that these parents have very real grievances against the respective school authorities which cannot be resolved short of constitutional adjudication. See generally Arthur Garfield Hays Civil Liberties Conference: Public Aid to Parochial Schools and Standing to Bring Suit, 12 Buffalo L.Rev. 35 (1962); Jaffe, Standing to Secure Judicial Review: Public Actions, 74 Harv.L.Rev. 1265 (1961); Sutherland, Due Process and Disestablishment, 62 Harv.L.Rev. 1306, 1327–1332 (1949); Comment, The Supreme Court, the First Amendment, and Religion in the Public Schools, 63 Col.L.Rev. 73, 94, n. 153 (1963).

The use of prayers and Bible readings at the opening of the school day long antedates the founding of our Republic. The Rules of the New Haven Hopkins Grammar School required in 1684 "[t]hat the Scholars being

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called together, the Mr. shall every morning begin his work with a short prayer for a blessing on his Laboures and their learning * * *." [31] More rigorous was the provision in a 1682 contract with a Dutch schoolmaster in Flatbush, New York:

> "When the school begins, one of the children shall read the morning prayer, as it stands in the catechism, and close with the prayer before dinner; in the afternoon it shall begin with the prayer after dinner, and end with the evening prayer. The evening school shall begin with the Lord's prayer, and close by singing a psalm." [32]

After the Revolution, the new States uniformly continued these long-established practices in the private and the few public grammar schools. The school committee of Boston in 1789, for example, required the city's several schoolmasters "daily to commence the duties of their office by prayer and reading a portion of the Sacred Scriptures * * *." [33] That requirement was mirrored throughout the original States, and exemplified the universal practice well into the nineteenth century. As the free public schools gradually supplanted the private academies and sectarian schools between 1800 and 1850, morning devotional exercises were retained with few alterations. Indeed, public pressures upon school administrators in many parts of the country would hardly have condoned abandonment of practices to which a century or more of private religious education had accustomed the American people.[34] The controversy centered, in

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fact, principally about the elimination of plainly sectarian practices and textbooks, and led to the eventual substitution of nonsectarian, though still religious, exercises and materials.[35]

Statutory provision for daily religious exercises is, however, of quite recent origin. At the turn of this century, there was but one State—Massachusetts—which had a law making morning prayer or Bible reading obligatory. Statutes elsewhere either permitted such practices or simply left the question to local option. It was not until after 1910 that 11 more States, within a few years joined Massachusetts in making one or both exercises compulsory.[36] The Pennsylvania law

31. Quoted in Dunn, What Happened to Religious Education? (1958), 21.

32. Quoted, id., at 22.

33. Quoted in Hartford, Moral Values in Public Education: Lessons From the Kentucky Experience (1958), 31.

34. See Culver, Horace Mann and Religion in the Massachusetts Public Schools (1929), for an account of one prominent educator's efforts to satisfy both the protests of those who opposed continuation of sectarian lessons and exercises in public schools, and the demands of those who insisted upon the retention of some essentially religious practices. Mann's continued use of the Bible for what he regarded as nonsectarian exercises represented his response to these cross-pressures. See Mann, Religious Education, in Blau, Cornerstones of Religious Freedom in America (1949), 163–201 (from the Twelfth Annual Report for 1848 of the Secretary of the Board of Education of Massachusetts). See also Boles, The Bible, Religion, and the Public Schools (1961), 22–27.

35. See 2 Stokes, Church and State in the United States (1950), 572–579; Greene, Religion and the State: The Making and Testing of an American Tradition (1941), 122–126.

36. E. g., Ala.Code, Tit. 52, § 542; Del. Code Ann., Tit. 14, §§ 4101, 4102; Fla. Stat.Ann. § 231.09(2); Mass.Ann.Laws, c. 71, § 31; Tenn.Code Ann. § 49–1307 (4). Some statutes, like the recently amended Pennsylvania statute involved in Schempp, provide for the excusal or exemption of children whose parents do not wish them to participate. See generally Johnson and Yost, Separation of Church and State in the United States (1948), 33–36; Thayer, The Role of the School

with which we are
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concerned in the Schempp case, for example, took effect in 1913; and even the Rule of the Baltimore School Board involved in the Murray case dates only from 1905. In no State has there ever been a constitutional or statutory prohibition against the recital of prayers or the reading of Scripture, although a number of States have outlawed these practices by judicial decision or administrative order. What is noteworthy about the panoply of state and local regulations from which these cases emerge is the relative recency of the statutory codification of practices which have ancient roots, and the rather small number of States which have ever prescribed compulsory religious exercises in the public schools.

The purposes underlying the adoption and perpetuation of these practices are somewhat complex. It is beyond question that the religious benefits and values realized from daily prayer and Bible reading have usually been considered paramount, and sufficient to justify the continuation of such practices. To Horace Mann, embroiled in an intense controversy over the role of *sectarian* instruction and textbooks in the Boston public schools, there was little question that the regular use of the Bible—which he thought essentially nonsectarian—would bear fruit in the spiritual enlightenment of his pupils.[37] A contemporary of Mann's the Commissioner of Education of a neighboring State, expressed a view which many enlightened educators of that day shared:

> "As a textbook of morals the Bible is pre-eminent, and should have a prominent place in our schools,
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> either as a reading book or as a source of appeal and instruction. Sectarianism, indeed, should not be countenanced in the schools; but the Bible is not sectarian * * *. The Scriptures should at least be read at the opening of the school, if no more. Prayer may also be offered with the happiest effects." [38]

Wisconsin's Superintendent of Public Instruction, writing a few years later in 1858, reflected the attitude of his eastern colleagues, in that he regarded "with special favor the use of the Bible in public schools, as pre-eminently first in importance among text-books for teaching the noblest principles of virtue, morality, patriotism, and good order—love and reverence for God—charity and good will to man." [39]

Such statements reveal the understanding of educators that the daily religious exercises in the schools served broader goals than compelling formal worship of God or fostering church attendance. The religious aims of the educators who adopted and retained such exercises were comprehensive, and in many cases quite devoid of sectarian bias—but the crucial fact is that they were nonetheless religious. While it has been suggested, see pp. 1601–1603, infra, that daily prayer

in American Society (1960), 374–375; Beth, The American Theory of Church and State (1958), 106–107. Compare with the American statutory approach Article 28(3) of the Constitution of India:

"(3) No person attending any educational institution recognised by the State or receiving aid out of State funds shall be required to take part in any religious instruction that may be imparted in such institution or to attend any religious worship that may be conducted in such institution or in any premises attached thereto unless such person or, if such person is a minor, his guardian has given his consent thereto." See 1 Chaudhri, Constitutional Rights and Limitations (1955), 876, 939.

37. See note 34, supra.

38. Quoted from New Hampshire School Reports, 1850, 31–32, in Kinney, Church and State: The Struggle for Separation in New Hampshire, 1630–1900 (1955), 157–158.

39. Quoted in Boyer, Religious Education of Public School Pupils in Wisconsin, 1953 Wis.L.Rev. 181, 186.

and reading of Scripture now serve secular goals as well, there can be no doubt that the origins of these practices were unambiguously religious, even where the educator's aim was not to win adherents to a particular creed or faith.

Almost from the beginning religious exercises in the public schools have been the subject of intense criticism, vigorous debate, and judicial or administrative prohibition. Significantly, educators and school boards

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early entertained doubts about both the legality and the soundness of opening the school day with compulsory prayer or Bible reading. Particularly in the large Eastern cities, where immigration had exposed the public schools to religious diversities and conflicts unknown to the homogeneous academies of the eighteenth century, local authorities found it necessary, even before the Civil War to seek an accommodation. In 1843, the Philadelphia School Board adopted the following resolutions:

> "RESOLVED, that no children be required to attend or unite in the reading of the Bible in the Public Schools, whose parents are conscientiously opposed thereto:
>
> "RESOLVED, that those children whose parents conscientiously prefer and desire any particular version of the Bible, without note or comment, be furnished with same." [40]

A decade later, the Superintendent of Schools of New York State issued an even bolder decree that prayers could no longer be required as part of public school activities, and that where the King James Bible was read, Catholic students could not be compelled to attend.[41] This type of accommodation was not restricted to the East Coast; the Cincinnati Board of Education resolved in 1869 that "religious instruction and the reading of religious books, including the Holy Bible, are prohibited in the common schools of Cincinnati, it being the true object and intent of this rule to allow the children of the parents of all sects and opinions, in matters of faith and worship,

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to enjoy alike the benefit of the common-school fund." [42] The Board repealed at the same time an earlier regulation which had required the singing of hymns and psalms to accompany the Bible reading at the start of the school day. And in 1889, one commentator ventured the view that "[t]here is not enough to be gained from Bible reading to justify the quarrel that has been raised over it." [43]

Thus a great deal of controversy over religion in the public schools had preceded the debate over the Blaine Amendment, precipitated by President Grant's insistence that matters of religion should be left "to the family altar, the church, and the private school, supported entirely by private contributions." [44] There was ample precedent, too, for Theodore Roosevelt's declaration that in the interest of "absolutely nonsectarian public schools" it was "not our business to have the Protestant Bible or the Catholic Vulgate or the Talmud read in those

40. Quoted in Dunn, What Happened to Religious Education? (1958), 271.

41. Quoted in Butts, The American Tradition in Religion and Education (1950), 135–136.

42. See Board of Education of City of Cleveland v. Minor, 23 Ohio St. 211; Blakely, American State Papers and Related Documents on Freedom in Religion (4th rev. ed. 1949), 864.

43. Report of the United States Commissioner of Education for the Year 1888–1889, part I, H.R.Exec.Doc. No. 1, part 5, 51st Cong., 1st Sess. 627.

44. Quoted in Illinois ex rel. McCollum v. Board of Education, supra, 333 U.S. at 218, 68 S.Ct. at 468 (opinion of Frankfurter, J.) See also President Grant's Annual Message to Congress, Dec. 7, 1875, 4 Cong.Rec. 175 et seq., which apparently inspired the drafting and submission of the Blaine Amendment. See Meyer, Comment, The Blaine Amendment and the Bill of Rights, 64 Harv.L.Rev. 939 (1951).

schools." [45] The same principle appeared in the message of an Ohio Governor who vetoed a compulsory Bible-reading bill in 1925:

> "It is my belief that religious teaching in our homes, Sunday schools, churches, by the good
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>
> mothers, fathers, and ministers of Ohio is far preferable to compulsory teaching of religion by the state. The spirit of our federal and state constitutions from the beginning * * [has] been to leave religious instruction to the discretion of parents." [46]

The same theme has recurred in the opinions of the Attorneys General of several States holding religious exercises or instruction to be in violation of the state or federal constitutional command of separation of church and state.[47] Thus the basic principle upon which our decision last year in Engel v. Vitale necessarily rested, and which we reaffirm today, can hardly be thought to be radical or novel.

Particularly relevant for our purposes are the decisions of the state courts on questions of religion in the public schools. Those decisions, while not, of course, authoritative in this Court, serve nevertheless to define the problem before us and to guide our inquiry. With the growth of religious diversity and the rise of vigorous dissent it was inevitable that the courts would be called upon to enjoin religious practices in the public schools which offended certain sects and groups. The earliest of such decisions declined to review the propriety of actions taken by school authorities, so long as those actions were within

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the purview of the administrators' powers.[48] Thus, where the local school board *required* religious exercises, the courts would not enjoin them; [49] and where, as in at least one case, the school officials *forbade* devotional practices, the court refused on similar grounds to overrule that decision.[50] Thus, whichever way the early cases came up, the governing principle of nearly complete deference to administrative discretion effectively foreclosed any consideration of constitutional questions.

The last quarter of the nineteenth century found the courts beginning to question the constitutionality of public school religious exercises. The legal context was still, of course, that of the state constitutions, since the First Amendment had not yet been held applicable to state action. And the state constitutional prohibitions against church-state cooperation or governmental aid to religion were generally less rigorous than the Establishment Clause of the First Amendment. It is therefore remarkable that the courts of a half dozen States found compulsory religious exercises in the public schools in violation of their respective state constitutions.[51] These

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courts at-

45. Theodore Roosevelt to Michael A. Schaap, Feb. 22, 1915, 8 Letters of Theodore Roosevelt (Morison ed. 1954), 893.

46. Quoted in Boles, The Bible, Religion, and the Public Schools (1961), 238.

47. E. g., 1955 Op.Ariz.Atty.Gen. 67; 26 Ore.Op.Atty.Gen. 46 (1952); 25 Cal. Op.Atty.Gen. 316 (1955); 1948–1950 Nev.Atty.Gen.Rep. 69 (1948). For a 1961 opinion of the Attorney General of Michigan to the same effect, see 63 American Jewish Yearbook (1962) 189. In addition to the Governor of Ohio, see note 46, supra, a Governor of Arizona vetoed a proposed law which would have permitted "reading the Bible, without comment, except to teach Historical or Literary facts." See 2 Stokes, Church and State in the United States (1950), 568.

48. See Johnson and Yost, Separation of Church and State in the United States (1948), 71; Note, Bible Reading in Public Schools, 9 Vand.L.Rev. 849, 851 (1956).

49. E. g., Spiller v. Inhabitants of Woburn, 12 Allen (94 Mass. 127) 127 (1866); Donahoe v. Richards, 38 Maine 376, 413 (1854); cf. Ferriter v. Tyler, 48 Vt. 444, 471–472 (1876).

50. Board of Education of City of Cleveland v. Minor, 23 Ohio St. 211 (1873).

51. People ex rel. Ring v. Board of Education of Dist. No. 24, 245 Ill. 334, 92 N.E.

tributed much significance to the clearly religious origins and content of the challenged practices, and to the impossibility of avoiding sectarian controversy in their conduct. The Illinois Supreme Court expressed in 1910 the principles which characterized these decisions:

"The public school is supported by the taxes which each citizen, regardless of his religion or his lack of it, is compelled to pay. The school, like the government, is simply a civil institution. It is secular, and not religious, in its purposes. The truths of the Bible are the truths of religion, which do not come within the province of the public school. * * No one denies that they should be taught to the youth of the State. The constitution and the law do not interfere with such teaching, but they do banish theological polemics from the schools and the school districts. This is done, not from any hostility to religion, but because it is no part of the duty of the State to teach religion,—to take the money of all and apply it to teaching the children of all the religion of a part, only. Instruction in religion must be voluntary." People ex rel. Ring v. Board of Education of Dist. No. 24, 245 Ill. 334, 349, 92 N. E. 251, 256 (1910).

The Supreme Court of South Dakota, in banning devotional exercises from the public schools of that State, also cautioned that "[t]he state as an educator must keep out of this field, and especially is this true in the common schools, where the child is immature, without fixed religious convictions * * *." State ex rel. Finger v. Weedman, 55 S.D. 343, 357, 226 N.W. 348, 354 (1929).

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Even those state courts which have sustained devotional exercises under state law [52] have usually recognized the primarily religious character of prayers and Bible readings. If such practices were not for that reason unconstitutional, it was necessarily because the state constitution forbade only public expenditures for *sectarian* instruction, or for activities which made the schoolhouse a "place of worship," but said nothing about the subtler question of laws "respecting an establishment of religion." [53] Thus the

251 (1910); Herold v. Parish Board of School Directors, 136 La. 1034, 68 So. 116 (1915); State ex rel. Weiss v. District Board, 76 Wis. 177, 44 N.W. 967 (1890); State ex rel. Finger v. Weedman, 55 S.D. 343, 226 N.W. 348 (1929); State ex rel. Dearle v. Frazier, 102 Wash. 369, 173 P. 35 (1918); cf. State ex rel. Clithero v. Showalter, 159 Wash. 519, 293 P. 1000 (1930); State ex rel. Freeman v. Scheve, 65 Neb. 853, 91 N.W. 846 (1902), modified, 65 Neb. 876, 93 N.W. 169 (1903). The cases are discussed in Boles, The Bible, Religion, and the Public Schools (1961), c. IV; Harrison, The Bible, the Constitution and Public Education, 29 Tenn.L.Rev. 363, 386–389 (1962).

52. Moore v. Monroe, 64 Iowa 367, 20 N.W. 475 (1884); Hackett v. Brooksville Graded School District, 120 Ky. 608, 87 S.W. 792 (1905); Billard v. Board of Education, 69 Kan. 53, 76 P. 422 (1904); Pfeiffer v. Board of Education, 118 Mich. 560, 77 N.W. 250 (1898); Kaplan v. Independent School District, 171 Minn. 142, 214 N.W. 18 (1927); Lewis v. Board of Education of City of New York, 157 Misc. 520, 285 N.Y.S. 164 (Sup.Ct.1935), modified on other grounds, 247 App.Div. 106, 286 N.Y.S. 174 (1936), appeal dismissed, 276 N.Y. 490, 12 N.E.2d 172 (1937); Doremus v. Board of Education, 5 N.J. 435, 75 A.2d 880 (1950), appeal dismissed, 342 U.S. 429, 72 S.Ct. 394, 96 L. Ed. 475; Church v. Bullock, 104 Tex. 1, 109 S.W. 115, 16 L.R.A.,N.S., 860 (1908); People ex rel. Vollmar v. Stanley, 81 Colo. 276, 255 P. 610 (1927); Wilkerson v. City of Rome, 152 Ga. 762, 110 S.E. 895, 20 A.L.R. 1334 (1922); Carden v. Bland, 199 Tenn. 665, 288 S.W.2d 718 (1956); Chamberlin v. Dade County Board of Public Instruction, 143 So.2d 21 (Fla.1962).

53. For discussion of the constitutional and statutory provisions involved in the state cases which sustained devotional exercises in the public schools, see Boles, The Bible, Religion, and the Public Schools (1961), c. III; Harrison, The Bible, the Constitution and Public Education, 29

panorama of history permits no
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other conclusion than that daily prayers and Bible readings in the public schools have always been designed to be, and have been regarded as, essentially religious exercises. Unlike the Sunday closing laws, these exercises appear neither to have been divorced from their religious origins nor deprived of their centrally religious character by the passage of time.[54] cf. McGowan v. Maryland, supra, 366 U.S. at 442–445, 81 S.Ct. at 1113–1115. On this distinction alone we might well rest a constitutional decision. But three further contentions have been pressed in the argument of these cases. These contentions deserve careful consideration, for if the position of the school authorities were correct in respect to any of them, we would be misapplying the principles of Engel v. Vitale.

A.

First, it is argued that however clearly religious may have been the origins and early nature of daily prayer and Bible reading, these practices today serve so clearly secular educational purposes that their religious attributes may be overlooked. I do not doubt, for example, that morning devotional exercises may foster better discipline in the classroom, and elevate the spiritual level on which the school day opens. The Pennsylvania Superintendent of Public Instruction, testifying by deposition in the Schempp case, offered his view that daily Bible reading "places upon the children or those hearing the reading of this, and the atmosphere which goes on in the reading * * * one of the last vestiges of moral value
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that we have left in our school system." The exercise thus affords, the Superintendent concluded, "a strong contradiction to the materialistic trends of our time." Baltimore's Superintendent of Schools expressed a similar view of the practices challenged in the Murray case, to the effect that "[t]he acknowledgement of the existence of God as symbolized in the opening exercises establishes a discipline tone which tends to cause each individual pupil to constrain his overt acts and to consequently conform to accepted standards of behavior during his attendance at school." These views are by no means novel, see, e. g., Billard v. Board of Education, 69 Kan. 53, 57–58, 76 P. 422, 423, 66 L.R.A. 166 (1904).[55]

It is not the business of this Court to gainsay the judgments of experts on matters of pedagogy. Such decisions must

Tenn.L.Rev. 363, 381–385 (1962); Fellman, Separation of Church and State in the United States: A Summary View, 1950 Wis.L.Rev. 427, 450–452; Note, Bible Reading in Public Schools, 9 Vand. L.Rev. 849, 854–859 (1956); Note, Nineteenth Century Judicial Thought Concerning Church-State Relations, 40 Minn.L. Rev. 672, 675–678 (1956). State courts appear to have been increasingly influenced in sustaining devotional practices by the availability of an excuse or exemption for dissenting students. See Cushman, The Holy Bible and the Public Schools, 40 Cornell L.Q. 475, 477 (1955); 13 Vand.L.Rev. 552 (1960).

54. See Rosenfield, Separation of Church and State in the Public Schools, 22 U. of Pitt.L.Rev. 561, 571–572 (1961); Harrison, The Bible, the Constitution and Public Education, 29 Tenn.L.Rev. 363, 399–400 (1962); 30 Ford.L.Rev. 801, 803 (1962); 45 Va.L.Rev. 1381 (1959). The essentially religious character of the materials used in these exercises is, in fact, strongly suggested by the presence of excusal or exemption provisions, and by the practice of rotating or alternating the use of different prayers and versions of the Holy Bible.

55. In the Billard case, the teacher whose use of the Lord's Prayer and the Twenty-third Psalm was before the court testified that the exercise served disciplinary rather than spiritual purposes:
"It is necessary to have some general exercise after the children come in from the playground to prepare them for their work. You need some general exercise to quiet them down."
When asked again if the purpose were not at least partially religious, the teacher replied, "[i]t was religious to the children that are religious, and to the others it was not." 69 Kan., at 57–58, 76 P., at 423.

be left to the discretion of those administrators charged with the supervision of the Nation's public schools. The limited province of the courts is to determine whether the means which the educators have chosen to achieve legitimate pedagogical ends infringe the constitutional freedoms of the First Amendment. The secular purposes which devotional exercises are said to serve fall into two categories—those which depend upon an immediately religious experience shared by the participating children; and those which appear sufficiently divorced from the religious content of the devotional material that they can be served equally by nonreligious

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materials. With respect to the first objective, much has been written about the moral and spiritual values of infusing some religious influence or instruction into the public school classroom.[56] To the extent that only *religious* materials will serve this purpose, it seems to me that the purpose as well as the means is so plainly religious that the exercise is necessarily forbidden by the Establishment Clause. The fact that purely secular benefits may eventually result does not seem to me to justify the exercises, for similar indirect nonreligious benefits could no doubt have been claimed for the released time program invalidated in McCollum.

The second justification assumes that religious exercises at the start of the school day may directly serve solely secular ends—for example, by fostering harmony and tolerance among the pupils, enhancing the authority of the teacher, and inspiring better discipline. To the extent that such benefits result not from the content of the readings and recitation, but simply from the holding of such a solemn exercise at the opening assembly or the first class of the day, it would seem that less sensitive materials might equally well serve the same purpose. I have previously suggested that Torcaso and the Sunday Law Cases forbid the use of religious means to achieve secular

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ends where nonreligious means will suffice. That principle is readily applied to these cases. It has not been shown that readings from the speeches and messages of great Americans, for example, or from the documents of our heritage of liberty, daily recitation of the Pledge of Allegiance, or even the observance of a moment of reverent silence at the opening of class, may not adequately serve the solely secular purposes of the devotional activities without jeopardizing either the religious liberties of any members of the community or the proper degree of separation between the spheres of religion and government.[57] Such substitutes would, I think, be un-

56. See, e. g., Henry, The Place of Religion in Public Schools (1950); Martin, Our Public Schools—Christian or Secular (1952); Educational Policies Comm'n of the National Educational Assn., Moral and Spiritual Values in the Public Schools (1951), c. IV; Harner, Religion's Place in General Education (1949). Educators are by no means unanimous, however, on this question. See Boles, The Bible, Religion, and the Public Schools (1961), 223–224. Compare George Washington's advice in his Farewell Address:

"And let us with caution indulge the supposition, that morality can be maintained without religion. Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect that National morality can prevail in exclusion of religious principle." 35 Writings of George Washington (Fitzpatrick ed. 1940), 229.

57. Thomas Jefferson's insistence that where the judgments of young children "are not sufficiently matured for religious inquiries, their memories may here be stored with the most useful facts from Grecian, Roman, European and American history," 2 Writings of Thomas Jefferson (Memorial ed. 1903), 204, is relevant here. Recent proposals have explored the possibility of commencing the school day "with a quiet moment that would still the tumult of the playground and start a day of study," Editorial, Washington Post, June 28, 1962, § A, p. 22, col. 2. See also New York Times, Aug. 30, 1962, § 1, p. 18, col. 2. For a consideration of these and other alternative proposals see Choper, Religion in the Public Schools: A Proposed Constitutional Standard, 47

satisfactory or inadequate only to the extent that the present activities do in fact serve religious goals. While I do not question the judgment of experienced educators that the challenged practices may well achieve valuable secular ends, it seems to me that the State acts unconstitutionally if it either sets about to attain even indirectly religious ends by religious means, or if it uses religious means to serve secular ends where secular means would suffice.

B.

Second, it is argued that the particular practices involved in the two cases before us are unobjectionable

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because they prefer no particular sect or sects at the expense of others. Both the Baltimore and Abington procedures permit, for example, the reading of any of several versions of the Bible, and this flexibility is said to ensure neutrality sufficiently to avoid the constitutional prohibition. One answer, which might be dispositive, is that any version of the Bible is inherently sectarian, else there would be no need to offer a system of rotation or alternation of versions in the first place, that is, to allow different sectarian versions to be used on different days. The sectarian character of the Holy Bible has been at the core of the whole controversy over religious practices in the public schools throughout its long and often bitter history.[58] To

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vary the version as the Abington and Baltimore schools have done may well be less offensive than to read from the King James version every day, as once was the practice. But the result even of this relatively benign procedure is that majority sects are preferred in approximate proportion to their representation in the community and in the student body, while the smaller sects suffer commensurate discrimination. So long as the subject matter of the exercise is sectarian in character, these consequences cannot be avoided.

The argument contains, however, a more basic flaw. There are persons in every community—often deeply devout—to whom any version of the Judaeo-Christian Bible is offensive.[59] There are others

Minn.L.Rev. 329, 370–371 (1963). See also 2 Stokes, Church and State in the United States (1950), 571.

58. The history, as it bears particularly upon the role of sectarian differences concerning Biblical texts and interpretation, has been summarized in Tudor v. Board of Education, 14 N.J. 31, 36–44, 100 A.2d 857, 859–864, 45 A.L.R.2d 729. See also State ex rel. Weiss v. District Board, 76 Wis. 177, 190–193, 44 N.W. 967, 972–975, 7 L.R.A. 330. One state court adverted to these differences a half century ago:

"The Bible, in its entirety, is a sectarian book as to the Jew and every believer in any religion other than the Christian religion, and as to those who are heretical or who hold beliefs that are not regarded as orthodox * * * its use in the schools necessarily results in sectarian instruction. There are many sects of Christians, and their differences grow out of their differing constructions of various parts of the Scriptures—the different conclusions drawn as to the effect of the same words. The portions of Scripture which form the basis of these sectarian differences cannot be thoughtfully and intelligently read without impressing the reader, favorably or otherwise, with reference to the doctrines supposed to be derived from them." People ex rel. Ring v. Board of Education, 245 Ill. 334, 347–348, 92 N.E. 251, 255, 29 L.R.A.,N.S., 442. But see, for a sharply critical comment, Schofield, Religious Liberty and Bible Reading in Illinois Public Schools, 6 Ill.L.Rev. 17 (1911).

See also Dunn, What Happened to Religious Education? (1958), 268–273; Dawson, America's Way in Church, State, and Society (1953), 53–54; Johnson and Yost, Separation of Church and State in the United States (1948), c. IV; Harpster, Religion, Education and the Law, 36 Marquette L.Rev. 24, 44–45 (1952); 20 Ohio State L.J. 701, 702–703 (1959).

59. See Torcaso v. Watkins, supra, 367 U.S. at 495, n. 11, 81 S.Ct. at 1684; Cushman, The Holy Bible and the Public Schools, 40 Cornell L.Q. 475, 480–483 (1955); Note, Separation of Church and State: Religious Exercises in the Schools, 31 U. of Cinc.L.Rev. 408, 411–

whose reverence for the Holy Scriptures demands private study or reflection and to whom public reading or recitation is sacrilegious, as one of the expert witnesses at the trial of the Schempp case explained. To such persons it is not the fact of using the Bible in the public schools, nor the content of any particular version, that is offensive, but only the *manner* in

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which it is used.[60] For such persons, the anathema of public communion is even more pronounced when prayer is involved. Many deeply devout persons have always regarded prayer as a necessarily private experience.[61] One Protestant group recently commented, for example: "When one thinks of prayer as sincere outreach of a

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human soul to the Creator, 'required prayer' becomes an absurdity." [62] There is a similar problem with respect to comment upon the passages of Scripture which are to be read. Most present statutes forbid comment, and this practice accords with the views of many religious groups as to the manner in which the Bible should be read. However, as a recent survey discloses, scriptural passages read without comment frequently convey no message to the younger children in the school. Thus there has developed a practice in some schools of bridging the gap between faith and understanding by means of "definitions," even where "com-

412 (1962). Few religious persons today would share the universality of the Biblical canons of John Quincy Adams:

"You ask me *what* Bible I take as the standard of my faith—the Hebrew, the Samaritan, the old English translation, or what? I answer, the Bible containing the sermon upon the mount—any Bible that I can read and understand. * * * I take any one of them for my standard of faith. If Socinus or Preistley had made a fair *translation* of the Bible, I would have taken that, but without their comments." John Quincy Adams to John Adams, Jan. 3, 1817, in Koch and Peden, Selected Writings of John and John Quincy Adams (1946), 292.

60. Rabbi Solomon Grayzel testified before the District Court, "In Judaism the Bible is not read, it is studied. There is no special virtue attached to a mere reading of the Bible; there is a great deal of virtue attached to a study of the Bible." See Boles, The Bible, Religion, and the Public Schools (1961), 208–218; Choper, Religion in the Public Schools: A Proposed Constitutional Standard, 47 Minn. L.Rev. 329, 372–375 (1963). One religious periodical has suggested the danger that "an observance of this sort is likely to deteriorate quickly into an empty formality with little, if any spiritual significance. Prescribed forms of this sort, as many colleges have concluded after years of compulsory chapel attendance, can actually work against the inculcation of vital religion." Prayers in Public Schools Opposed, 69 Christian Century, Jan. 9, 1952, p. 35.

61. See Cahn, On Government and Prayer, 37 N.Y.U.L.Rev. 981, 993–994 (1962). A leading Protestant journal recently noted:

"Agitation for removal of religious practices in public schools is not prompted or supported entirely by Jews, humanists, and atheists. At both local and national levels, many Christian leaders, concerned both for civil rights of minorities and for adequate religious education, are opposed to religious exercises in public schools. * * * Many persons, both Jews and Christians, believe that prayer and Bible reading are too sacred to be permitted in public schools in spite of their possible moral value." Smith, The Religious Crisis In Our Schools, 128 The Episcopalian, May 1963, pp. 12–13. See, e. g., for other recent statements on this question, Editorial, Amending the Amendment, 108 America, May 25, 1963, p. 736; Sissel, A Christian View: Behind the Fight Against School Prayer, 27 Look, June 18, 1963, p. 25.

It should be unnecessary to demonstrate that the Lord's Prayer, more clearly than the Regents' Prayer involved in Engel v. Vitale, is an essentially Christian supplication. See, e. g., Scott, The Lord's Prayer: Its Character, Purpose, and Interpretation (1951), 55; Buttrick, So We Believe, So We Pray (1951), 142; Levy Lord's Prayer, in 7 Universal Jewish Encyclopedia (1948), 192–193.

62. Statement of the Baptist Joint Committee on Public Affairs, in 4 J. Church and State 144 (1962).

ment" is forbidden by statute.[63] The present practice therefore poses a difficult dilemma: While Bible reading is almost universally required to be without comment, since only by such a prohibition can sectarian interpretation be excluded from the classroom,

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the rule breaks down at the point at which rudimentary definitions of Biblical terms are necessary for comprehension if the exercise is to be meaningful at all.

It has been suggested that a tentative solution to these problems may lie in the fashioning of a "common core" of theology tolerable to all creeds but preferential to none.[64] But as one commentator has recently observed, "[h]istory is not encouraging to" those who hope to fashion a "common denominator of religion detached from its manifestation in any organized church." Sutherland, Establishment According to Engel, 76 Harv.L.Rev. 25, 51 (1962). Thus, the notion of a "common core" litany or supplication offends many deeply devout worshippers who do not find clearly sectarian practices objectionable.[65] Father Gustave Weigel has recently expressed

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a widely shared view: "The moral code held by each sep-

63. See Harrison, The Bible, the Constitution and Public Education, 29 Tenn.L. Rev. 363, 397 (1962). The application of statutes and regulations which forbid comment on scriptural passages is further complicated by the view of certain religious groups that reading without comment is either meaningless or actually offensive. Compare Rabbi Grayzel's testimony before the District Court that "the Bible is misunderstood when it is taken without explanation." A recent survey of the attitudes of certain teachers disclosed concern that "refusal to answer pupil questions regarding any curricular activity is not educationally sound," and that reading without comment might create in the minds of the pupils the impression that something was "hidden or wrong." Boles, The Bible, Religion, and the Public Schools (1961), 235–236. Compare the comment of a foreign observer: "In no other field of learning would we expect a child to draw the full meaning from what he reads without accompanying explanatory comment. But comment by the teacher will inevitably reveal his own personal preferences; and the exhibition of preferences is what we are seeking to eliminate." MacKinnon, Freedom?—or Tolerations? The Problem of Church and State in the United States, [1959] Pub.Law 374, 383.

64. See Abbott, A Common Bible Reader for Public Schools, 56 Religious Education 20 (1961); Note, 22 Albany L.Rev. 156–157 (1958); 2 Stokes, Church and State in the United States (1950), 501–506 (describing the "common denominator" or "three faiths" plan and certain programs of instruction designed to implement the "common core" approach). The attempts to evolve a universal, non-denominational prayer are by no means novel. See, e. g., Madison's letter to Edward Everett, March 19, 1823, commenting upon a "project of a prayer * * * intended to comprehend & conciliate College Students of every [Christian] denomination, by a Form composed wholly of texts & phrases of scripture." 9 Writings of James Madison (Hunt ed. 1910), 126. For a fuller description of this and other attempts to fashion a "common core" or nonsectarian exercise, see Engel v. Vitale, 18 Misc.2d 659, 660–662, 191 N.Y.S.2d 453, 459–460.

65. See the policy statement recently drafted by the National Council of the Churches of Christ: "* * * neither true religion nor good education is dependent upon the devotional use of the Bible in the public school program. * * * Apart from the constitutional questions involved, attempts to establish a 'common core' of religious beliefs to be taught in public schools for the purpose of indoctrination are unrealistic and unwise. Major faith groups have not agreed on a formulation of religious beliefs common to all. Even if they had done so, such a body of religious doctrine would tend to become a substitute for the more demanding commitments of historic faiths." Washington Post, May 25, 1963, § A, p. 1, col. 4. See also Choper, Religion in the Public Schools: A Proposed Constitutional Standard, 47 Minn.L.Rev. 329, 341, 368–369 (1963). See also Hartford Moral Values in Public Education: Lessons from the Kentucky Experience (1958), 261–262; Moehlman, The Wall of Separation Between Church and State (1951), 158–159. Cf. Mosk, "Establishment Clause" Clarified, 22 Law in Transition 231, 235–236 (1963).

arate religious community can reductively be unified, but the consistent particular believer wants no such reduction." [66] And, as the American Council on Education warned several years ago, "The notion of a common core suggests a watering down of the several faiths to the point where common essentials appear. This might easily lead to a new sect—a public school sect—which would take its place alongside the existing faiths and compete with them." [67] Engel is surely authority that nonsectarian religious practices, equally with sectarian exercises, violate the Establishment Clause. Moreover, even if the Establishment Clause were oblivious to nonsectarian religious practices, I think it quite likely that the "common core" approach would be sufficiently objectionable to many groups to be foreclosed by the prohibitions of the Free Exercise Clause.

C.

A third element which is said to absolve the practices involved in these cases from the ban of the religious guarantees of the Constitution is the provision to excuse or exempt students who wish not to participate. Insofar as these practices are claimed to violate the Establishment

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Clause, I find the answer which the District Court gave after our remand of Schempp to be altogether dispositive:

> "The fact that some pupils, or theoretically all pupils, might be excused from attendance at the exercises does not mitigate the obligatory nature of the ceremony * *. The exercises are held in the school buildings and perforce are conducted by and under the authority of the local school authorities and during school sessions. Since the statute requires the reading of the 'Holy Bible', a Christian document, the practice, as we said in our first opinion, prefers the Christian religion. The record demonstrates that it was the intention of the General Assembly of the Commonwealth of Pennsylvania to introduce a religious ceremony into the public schools of the Commonwealth." 201 F.Supp., at 819.

Thus the short, and to me sufficient, answer is that the availability of excusal or exemption simply has no relevance to the establishment question, if it is once found that these practices are essentially religious exercises designed at least in part to achieve religious aims through the use of public school facilities during the school day.

The more difficult question, however, is whether the availability of excusal for the dissenting child serves to refute challenges to these practices under the Free Exercise Clause. While it is enough to decide these cases to dispose of the establishment questions, questions of free exercise are so inextricably interwoven into the history and present status of these practices as to justify disposition of this second aspect of the excusal issue. The answer is that the excusal procedure itself necessarily operates in such a way as to infringe the rights of free exercise of those children who wish to be excused. We have held in Barnette and Torcaso, respectively, that a State may require neither public school students nor candidates

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for an office of public trust to profess beliefs offensive to religious principles. By the same token the State could not constitutionally require a student to profess publicly his disbelief as the prerequisite to the exercise of his constitutional right of abstention. And apart from Torcaso and Barnette, I think Speiser v. Randall, 357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed.2d 1460, suggests a

66. Quoted in Kurland, The Regents' Prayer Case: "Full of Sound and Fury, Signifying * * *," 1962 Supreme Court Review (1962), 1, 31.

67. Quoted in Harrison, The Bible, the Constitution and Public Education, 29 Tenn. L.Rev. 363, 417 (1962). See also Dawson, America's Way in Church, State, and Society (1953), 54.

further answer. We held there that a State may not condition the grant of a tax exemption upon the willingness of those entitled to the exemption to affirm their loyalty to the Government, even though the exempton was itself a matter of grace rather than of constitutional right. We concluded that to impose upon the eligible taxpayers the affirmative burden of proving their loyalty impermissibly jeopardized the freedom to engage in constitutionally protected activities close to the area to which the loyalty oath related. Speiser v. Randall seems to me to dispose of two aspects of the excusal or exemption procedure now before us. First, by requiring what is tantamount in the eyes of teachers and schoolmates to a profession of disbelief, or at least of nonconformity, the procedure may well deter those children who do not wish to participate for any reason based upon the dictates of conscience from exercising an indisputably constitutional right to be excused.[68] Thus the excusal

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provision in its operation subjects them to a cruel dilemma. In consequence, even devout children may well avoid claiming their right and simply continue to participate in exercises distasteful to them because of an understandable reluctance to be stigmatized as atheists or nonconformists simply on the basis of their request.

Such reluctance to seek exemption seems all the more likely in view of the fact that children are disinclined at this age to step out of line or to flout "peer-group norms." Such is the widely held view of experts who have studied the behaviors and attitudes of children.[69]

68. See the testimony of Edward L. Schempp, the father of the children in the Abington schools and plaintiff-appellee in No. 142, concerning his reasons for not asking that his children be excused from the morning exercises after excusal was made available through amendment of the statute:

"We originally objected to our children being exposed to the reading of the King James version of the Bible * * * and under those conditions we would have theoretically liked to have had the children excused. But we felt that the penalty of having our children labelled as 'odd balls' before their teachers and classmates every day in the year was even less satisfactory than the other problem. * * *

"The children, the classmates of Roger and Donna are very liable to label and lump all particular religious difference or religious objections as atheism, particularly, today the word 'atheism' is so often tied to atheistic communism, and atheism has very bad connotations in the minds of children and many adults today."

A recent opinion of the Attorney General of California gave as one reason for finding devotional exercises unconstitutional the likelihood that "[c]hildren forced by conscience to leave the room during such exercises would be placed in a position inferior to that of students adhering to the State-endorsed religion." 25 Cal.Op. Atty.Gen. 316, 319 (1955). Other views on this question, and possible effects of the excusal procedure, are summarized in Rosenfield, Separation of Church and State in the Public Schools, 22 U. of Pitt.L.Rev. 561, 581–585 (1961); Note, Separation of Church and State: Religious Exercises in the Schools, 31 U. of Cinc.L.Rev. 408, 416 (1962); Note, 62 W.Va.L.Rev. 353, 358 (1960).

69. Extensive testimony by behavioral scientists concerning the effect of similar practices upon children's attitudes and behaviors is discussed in Tudor v. Board of Education, 14 N.J. 31, 50–52, 100 A.2d 857, 867–868, 45 A.L.R.2d 729. See also Choper, Religion in the Public Schools: A Proposed Constitutional Standard, 47 Minn.L.Rev. 329, 344 (1963). There appear to be no reported experiments which bear directly upon the question under consideration. There have, however, been numerous experiments which indicate the susceptibility of school children to peer-group pressures, especially where important group norms and values are involved. See, e. g., Berenda, The Influence of the Group on the Judgments of Children (1950), 26–33; Argyle, Social Pressure in Public and Private Situations, 54 J. Abnormal & Social Psych. 172 (1957); cf. Rhine, The Effect of Peer Group Influence Upon Concept-Attitude Development and Change, 51 J. Social Psych. 173 (1960); French, Morrison and Levinger, Coercive Power and

This is also

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the basis of Mr. Justice Frankfurter's answer to a similar contention made in the McCollum case:

> "That a child is offered an alternative may reduce the constraint; it does not eliminate the operation of influence by the school in matters sacred to conscience and outside the school's domain. The law of imitation operates, and non-conformity is not an
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> outstanding characteristic of children. The result is an obvious pressure upon children to attend." 333 U.S., at 227, 68 S.Ct., at 473.

Also apposite is the answer given more than 70 years ago by the Supreme Court of Wisconsin to the argument that an excusal provision saved a public school devotional exercise from constitutional invalidation:

> "* * * the excluded pupil loses caste with his fellows, and is liable to be regarded with aversion, and subjected to reproach and insult. But it is a sufficient refutation of the argument that the practice in question tends to destroy the equality of the pupils which the constitution seeks to establish and protect, and puts a portion of them to serious disadvantage in many ways with respect to the others." State ex rel. Weiss v. District Board of School District No. 8, 76 Wis. 177, 200, 44 N.W. 967, 975, 7 L.R.A. 330.

And 50 years ago a like answer was offered by the Louisiana Supreme Court:

> "Under such circumstances, the children would be excused from the opening exercises * * * because of their religious beliefs. And excusing such children on religious grounds, although the number excused might be very small, would be a distinct preference in favor of the religious beliefs of the majority, and would work a discrimination against those who were excused. The exclusion of a pupil under such circumstances puts him in a class by himself; it subjects him to a religious stigma; and all because of his religious belief. Equality in public education would be destroyed by such act, under a Constitution which seeks to establish equality and freedom in religious matters." Herold v. Parish Board of School Directors, 136 La. 1034, 1049–1050, 68 So. 116, 121, L.R.A.1915D, 941. See also

Forces Affecting Conformity, 61 J. Abnormal and Social Psych. 93 (1960). For a recent and important experimental study of the susceptibility of students to various factors in the school environment, see Zander, Curtis and Rosenfeld, The Influence of Teachers and Peers on Aspirations of Youth (U. S. Office of Education Cooperative Research Project No. 451, 1961), 24–25, 78–79. It is also apparent that the susceptibility of school children to prestige suggestion and social influence within the school environment varies inversely with the age, grade level, and consequent degree of sophistication of the child, see Patel and Gordon, Some Personal and Situational Determinants of Yielding to Influence, 61 J. Abnormal and Social Psych. 411, 417 (1960).

Experimental findings also shed some light upon the probable effectiveness of a provision for excusal when, as is usually the case, the percentage of the class wishing not to participate in the exercises is very small. It has been demonstrated, for example, that the inclination even of adults to depart or dissent overtly from strong group norms varies proportionately with the size of the dissenting group—that is, inversely with the apparent or perceived strength of the norm itself—and is markedly slighter in the case of the sole or isolated dissenter. See, e. g., Asch, Studies of Independence and Conformity: I. A Minority of One Against a Unanimous Majority (Psych. Monographs No. 416, 1956), 69–70; Asch, Effects of Group Pressure upon the Modification and Distortion of Judgments, in Cartwright and Zander, Group Dynamics (2d ed. 1960), 189–199; Luchins and Luchins, On Conformity With True and False Communications, 42 J. Social Psych. 283 (1955). Recent important findings on these questions are summarized in Hare, Handbook of Small Group Research (1962), c. II.

Tudor v. Board of Education, 14 N.J. 31, 48–52,

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100 A.2d 857, 867–868, 45 A.L.R.2d 729; Brown v. Orange County Board of Public Instruction, 128 So.2d 181, 185 (Fla.App.).

Speiser v. Randall also suggests the answer to a further argument based on the excusal procedure. It has been suggested by the School Board, in Schempp, that we ought not pass upon the appellees' constitutional challenge at least until the children have availed themselves of the excusal procedure and found it inadequate to redress their grievances. Were the right to be excused not itself of constitutional stature, I might have some doubt about this issue. But we held in Speiser that the constitutional vice of the loyalty oath procedure discharged any obligation to seek the exemption before challenging the constitutionality of the conditions upon which it might have been denied. 357 U.S., at 529, 78 S.Ct., at 1343. Similarly, we have held that one need not apply for a permit to distribute constitutionally protected literature, Lovell v. Griffin, 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949, or to deliver a speech, Thomas v. Collins, 323 U.S. 516, 65 S.Ct. 315, 89 L.Ed. 430, before he may attack the constitutionality of a licensing system of which the defect is patent. Insofar as these cases implicate only questions of establishment, it seems to me that the availability of an excuse is constitutionally irrelevant. Moreover, the excusal procedure seems to me to operate in such a way as to discourage the free exercise of religion on the part of those who might wish to utilize it, thereby rendering it unconstitutional in an additional and quite distinct respect.

To summarize my views concerning the merits of these two cases: The history, the purpose and the operation of the daily prayer recital and Bible reading leave no doubt that these practices standing by themselves constitute an impermissible breach of the Establishment Clause. Such devotional exercises may well serve legitimate nonreligious purposes. To the extent, however, that such purposes

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are really without religious significance, it has never been demonstrated that secular means would not suffice. Indeed, I would suggest that patriotic or other nonreligious materials might provide adequate substitutes—inadequate only to the extent that the purposes now served are indeed directly or indirectly religious. Under such circumstances, the States may not employ religious means to reach a secular goal unless secular means are wholly unavailing. I therefore agree with the Court that the judgment in Schempp, No. 142, must be affirmed, and that in Murray, No. 119, must be reversed.

V.

These considerations bring me to a final contention of the school officials in these cases: that the invalidation of the exercises at bar permits this Court no alternative but to declare unconstitutional every vestige, however slight, of cooperation or accommodation between religion and government. I cannot accept that contention. While it is not, of course, appropriate for this Court to decide questions not presently before it, I venture to suggest that religious exercises in the public schools present a unique problem. For not every involvement of religion in public life violates the Establishment Clause. Our decision in these cases does not clearly forecast anything about the constitutionality of other types of interdependence between religious and other public institutions.

Specifically, I believe that the line we must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers. It is a line which the Court has consistently sought to mark in its decisions expounding the religious guarantees of the First Amendment. What the Framers meant to foreclose, and what our decisions under the Establishment Clause have forbidden,

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are those involvements

of religious with secular institutions which (a) serve the essentially religious activities of religious institutions; (b) employ the organs of government for essentially religious purposes; or (c) use essentially religious means to serve governmental ends, where secular means would suffice. When the secular and religious institutions become involved in such a manner, there inhere in the relationship precisely those dangers—as much to church as to state—which the Framers feared would subvert religious liberty and the strength of a system of secular government. On the other hand, there may be myriad forms of involvements of government with religion which do not import such dangers and therefore should not, in my judgment, be deemed to violate the Establishment Clause. Nothing in the Constitution compels the organs of government to be blind to what everyone else perceives—that religious differences among Americans have important and pervasive implications for our society. Likewise nothing in the Establishment Clause forbids the application of legislation having purely secular ends in such a way as to alleviate burdens upon the free exercise of an individual's religious beliefs. Surely the Framers would never have understood that such a construction sanctions that involvement which violates the Establishment Clause. Such a conclusion can be reached, I would suggest, only by using the words of the First Amendment to defeat its very purpose.

The line between permissible and impermissible forms of involvement between government and religion has already been considered by the lower federal and state courts. I think a brief survey of certain of these forms of accommodation will reveal that the First Amendment commands not official hostility toward religion, but only a strict neutrality in matters of religion. Moreover, it may serve to suggest that the scope of our holding today

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is to be measured by the special circumstances under which these cases have arisen, and by the particular dangers to church and state which religious exercises in the public schools present. It may be helpful for purposes of analysis to group these other practices and forms of accommodation into several rough categories.

A. *The Conflict Between Establishment and Free Exercise.*—There are certain practices, conceivably violative of the Establishment Clause, the striking down of which might seriously interfere with certain religious liberties also protected by the First Amendment.[70] Provisions for churches and chaplains at military establishments for those in the armed services may afford one such example.[71]

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The like provision by state and

70. See, on the general problem of conflict and accommodation between the two clauses, Katz, Freedom of Religion and State Neutrality, 20 U. of Chi.L.Rev. 426, 429 (1953); Griswold, Absolute Is In the Dark, 8 Utah L.Rev. 167, 176–179 (1963); Kauper, Church, State, and Freedom: A Review, 52 Mich.L.Rev. 829, 833 (1954). One author has suggested that the Establishment and Free Exercise Clauses must be "read as stating a single precept: that government cannot utilize religion as a standard for action or inaction because these clauses, read together as they should be, prohibit classification in terms of religion either to confer a benefit or to impose a burden." Kurland, Religion and the Law (1962), 112. Compare the formula of accommodation embodied in the Australian Constitution, § 116:

"The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth." Essays on the Australian Constitution (Else-Mitchell ed. 1961), 15.

71. There has been much difference of opinion throughout American history concerning the advisability of furnishing chaplains at government expense. Compare, e. g., Washington's order regarding chaplains for the Continental Army, July 9,

federal governments for chaplains in penal institutions may afford another example.[72] It is argued that such provisions may be assumed to contravene the Establishment Clause, yet be sustained on constitutional grounds as necessary to secure to the members of the Armed Forces and prisoners those rights of worship guaranteed under the Free Exercise Clause. Since government has deprived such persons of the opportunity

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to practice their faith at places of their choice, the argument runs, government may, in order to avoid infringing the free exercise guarantees, provide substitutes where it requires such persons to be. Such a principle might support, for example, the constitutionality of draft exemptions for ministers and divinity students,[73] cf. Selective Draft Law Cases (Arver v. United States), 245 U.S. 366, 389–390, 38 S.Ct. 159, 165, 62 L.Ed. 349; of the excusal of children from school on their respective religious holidays; and of the allowance by government of temporary use of public buildings by religious organizations when their own churches have become unavailable because of a disaster or emergency.[74]

1776, in 5 Writings of George Washington (Fitzpatrick ed. 1932), 244, with Madison's views on a very similar question, letter to Edward Livingston, July 10, 1822, 9 Writings of James Madison (Hunt ed. 1910), 100–103. Compare also this statement by the Armed Forces Chaplains Board concerning the chaplain's obligation:

"To us has been entrusted the spiritual and moral guidance of the young men and women in the Armed Services of this country. A chaplain has many duties—yet, first and foremost is that of presenting God to men and women wearing the military uniform. What happens to them while they are in military service has a profound effect on what happens in the community as they resume civilian life. We, as chaplains, must take full cognizance of that fact and dedicate our work to making them finer, spiritually strengthened citizens." Builders of Faith (U. S. Department of Defense 1955), ii.

It is interesting to compare in this regard an express provision, Article 149, of the Weimar Constitution: "Necessary free time shall be accorded to the members of the armed forces for the fulfilment of their religious duties." McBain and Rogers, The New Constitutions of Europe (1922), 203.

Compare Article XVIII of the Hague Convention Regulations of 1899:

"Prisoners of war shall enjoy every latitude in the exercise of their religion, including attendance at their own church services, provided only they comply with the regulations for order and police issued by the military authorities." Quoted in Blakely, American State Papers and Related Documents on Freedom in Religion (4th rev. ed. 1949), 313.

72. For a discussion of some recent and difficult problems in connection with chaplains and religious exercises in prisons, see, e. g., Pierce v. La Vallee, 2 Cir., 293 F.2d 233; In re Ferguson, 55 Cal.2d 663, 12 Cal.Rptr. 753, 361 P.2d 417; McBride v. McCorkle, 44 N.J.Super. 468, 130 A.2d 881; Brown v. McGinnis, 10 N.Y.2d 531, 225 N.Y.S.2d 497, 180 N.E.2d 791; discussed in Comment, 62 Col.L.Rev. 1488 (1962); 75 Harv.L.Rev. 837 (1962).

73. Compare generally Sibley and Jacob, Conscription of Conscience: The American State and the Conscientious Objector, 1940–1947 (1952), with Conklin, Conscientious Objector Provisions: A View in the Light of Torcaso v. Watkins, 51 Geo.L.J. 252 (1963).

74. See, e. g., Southside Estates Baptist Church v. Board of Trustees, 115 So.2d 697 (Fla.); Lewis v. Mandeville, 201 Misc. 120, 107 N.Y.S.2d 865; cf. School District No. 27 v. Schmidt, 128 Colo. 495, 263 P.2d 551 (temporary loan of school district's custodian to church). A different problem may be presented with respect to the regular use of public school property for religious activities, State ex rel. Gilbert v. Dilley, 95 Neb. 527, 145 N.W. 999, 50 L.R.A.,N.S., 1182; the erection on public property of a statute of or memorial to an essentially religious figure, State ex rel. Singelmann v. Morrison, 57 So.2d 238 (La.App.); seasonal displays of a religious character, Baer v. Kolmorgen, 14 Misc.2d 1015, 181 N.Y.S.2d 230; or the performance on public property of a drama or opera based on religious material or carrying a religious message, cf. County of Los Angeles v. Hollinger, 200 Cal.App.2d 877, 19 Cal.Rptr. 648.

Such activities and practices seem distinguishable from the sponsorship of daily Bible reading and prayer recital. For one thing, there is no element of coercion present in the appointment of military or prison chaplains; the soldier or convict who declines the opportunities for worship would not ordinarily subject himself to the suspicion or obloquy of his peers. Of special significance to this distinction is the fact that we are here usually dealing

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with adults, not with impressionable children as in the public schools. Moreover, the school exercises are not designed to provide the pupils with general opportunities for worship denied them by the legal obligation to attend school. The student's compelled presence in school for five days a week in no way renders the regular religious facilities of the community less accessible to him than they are to others. The situation of the school child is therefore plainly unlike that of the isolated soldier or the prisoner.

The State must be steadfastly neutral in all matters of faith, and neither favor nor inhibit religion. In my view, government cannot sponsor religious exercises in the public schools without jeopardizing that neutrality. On the other hand, hostility, not neutrality, would characterize the refusal to provide chaplains and places of worship for prisoners and soldiers cut off by the State from all civilian opportunities for public communion, the withholding of draft exemptions for ministers and conscientious objectors, or the denial of the temporary use of an empty public building to a congregation whose place of worship has been destroyed by fire or flood. I do not say that government *must* provide chaplains or draft exemptions, or that the courts should intercede if it fails to do so.

B. *Establishment and Exercises in Legislative Bodies.*—The saying of invocational prayers in legislative chambers, state or federal, and the appointment of legislative chaplains, might well represent no involvements of the kind prohibited by the Establishment Clause.[75] Legislators, federal and state, are mature adults who may presumably absent themselves from such public and ceremonial

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exercises without incurring any penalty, direct or indirect. It may also be significant that, at least in the case of the Congress, Art. I, § 5, of the Constitution makes each House the monitor of the "Rules of its Proceedings" so that it is at least arguable whether such matters present "political questions" the resolution of which is exclusively confided to Congress. See Baker v. Carr, 369 U.S. 186, 232, 82 S.Ct. 691, 718, 7 L.Ed.2d 663. Finally, there is the difficult question of who may be heard to challenge such practices. See Elliott v. White, 57 App.D.C. 389, 23 F.2d 997.

C. *Non-Devotional Use of the Bible In the Public Schools.*—The holding of the Court today plainly does not foreclose teaching *about* the Holy Scriptures or about the differences between religious sects in classes in literature or history. Indeed, whether or not the Bible is involved, it would be impossible to teach meaningfully many subjects in the social sciences or the humanities without some mention of religion.[76] To what

75. Compare Moulton and Myers, Report on Appointing Chaplains to the Legislature of New York, in Blau, Cornerstones of Religious Freedom in America (1949), 141–156; Comment, 63 Col.L.Rev. 73, 97 (1963).

76. A comprehensive survey of the problems raised concerning the role of religion in the secular curriculum is contained in Brown, ed., The Study of Religion in the Public Schools: An Appraisal (1958). See also Katz, Religion and American Constitutions, Lecture at Northwestern University Law School, March 21, 1963, pp. 37–41; Educational Policies Comm'n of the National Education Assn., Moral and Spiritual Values in the Public Schools (1951), 49–80. Compare, for a consideration of similar problems in state-supported colleges and universities, Louisell and Jackson, Religion, Theology, and Public Higher Education, 50 Cal.L.Rev. 751 (1962).

extent, and at what points in the curriculum, religious materials should be cited are matters which the courts ought to entrust very largely to the experienced officials who superintend our Nation's public schools. They are experts in such matters, and we are not. We should heed Mr. Justice Jackson's caveat that any attempt by this Court to announce curricular standards would be "to decree a uniform, rigid and, if we are consistent, an unchanging standard for countless school boards representing
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and serving highly localized groups which not only differ from each other but which themselves from time to time change attitudes." Illinois ex rel. McCollum v. Board of Education, supra, at 237 of 333 U.S., at 478 of 68 S.Ct.

We do not, however, in my view usurp the jurisdiction of school administrators by holding as we do today that morning devotional exercises in any form are constitutionally invalid. But there is no occasion now to go further and anticipate problems we cannot judge with the material now before us. Any attempt to impose rigid limits upon the mention of God or references to the Bible in the classroom would be fraught with dangers. If it should sometime hereafter be shown that in fact religion can play no part in the teaching of a given subject without resurrecting the ghost of the practices we strike down today, it will then be time enough to consider questions we must now defer.

D. *Uniform Tax Exemptions Incidentally Available to Religious Institutions.*—Nothing we hold today questions the propriety of certain tax deductions or exemptions which incidentally benefit churches and religious institutions, along with many secular charities and nonprofit organizations. If religious institutions benefit, it is in spite of rather than because of their religious character. For religious institutions simply share benefits which government makes generally available to educational, charitable, and eleemosynary groups.[77] There is no indication that taxing authorities have used such benefits in any way to subsidize worship or foster belief in God. And as
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among religious beneficiaries, the tax exemption or deduction can be truly nondiscriminatory, available on equal terms to small as well as large religious bodies, to popular and unpopular sects, and to those organizations which reject as well as those which accept a belief in God.[78]

E. *Religious Considerations in Public Welfare Programs.*—Since government may not support or directly aid religious *activities* without violating the Establishment Clause, there might be some doubt whether nondiscriminatory programs of governmental aid may constitutionally include *individuals* who become eligible wholly or partially for religious reasons. For example, it might be suggested that where a State provides unemployment compensation generally to those who are unable to find suitable work, it may not extend such benefits to persons who are unemployed by reason of religious beliefs or practices without thereby establishing the religion to which those persons belong. Therefore, the argument runs, the State may avoid an establishment only by singling out and excluding such persons on the ground that religious beliefs or practices have made them potential beneficiaries. Such a construction would, it seems to me,

77. See generally Torpey, Judicial Doctrines of Religious Rights in America (1948), c. VI; Van Alstyne, Tax Exemption of Church Property, 20 Ohio State L.J. 461 (1959); Sutherland, Due Process and Disestablishment, 62 Harv.L.Rev. 1306, 1336–1338 (1949); Louisell and Jackson, Religion, Theology, and Public Higher Education, 50 Cal.L.Rev. 751, 773–780 (1962); 7 De Paul L.Rev. 206 (1958); 58 Col.L.Rev. 417 (1958); 9 Stan.L.Rev. 366 (1957).

78. See, e. g., Washington Ethical Society v. District of Columbia, 101 U.S.App. D.C. 371, 249 F.2d 127; Fellowship of Humanity v. County of Alameda, 153 Cal. App.2d 673, 315 P.2d 394.

require government to impose religious discriminations and disabilities, thereby jeopardizing the free exercise of religion, in order to avoid what is thought to constitute an establishment.

The inescapable flaw in the argument, I suggest, is its quite unrealistic view of the aims of the Establishment Clause. The Framers were not concerned with the effects of certain incidental aids to individual worshippers which come about as by-products of general and nondiscriminatory welfare programs. If such benefits serve to make

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easier or less expensive the practice of a particular creed, or of all religions, it can hardly be said that the purpose of the program is in any way religious, or that the consequence of its nondiscriminatory application is to create the forbidden degree of interdependence between secular and sectarian institutions. I cannot therefore accept the suggestion, which seems to me implicit in the argument outlined here, that every judicial or administrative construction which is designed to prevent a public welfare program from abridging the free exercise of religious beliefs, is for that reason *ipso facto* an establishment of religion.

F. *Activities Which, Though Religious in Origin, Have Ceased to Have Religious Meaning.*—As we noted in our Sunday Law decisions, nearly every criminal law on the books can be traced to some religious principle or inspiration. But that does not make the present enforcement of the criminal law in any sense an establishment of religion, simply because it accords with widely held religious principles. As we said in McGowan v. Maryland, 366 U.S. 420, 442, 81 S.Ct. 1101, 1113, 6 L.Ed.2d 393, "the 'Establishment' Clause does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions." This rationale suggests that the use of the motto "In God We Trust" on currency, on documents and public buildings and the like may not offend the clause. It is not that the use of those four words can be dismissed as "de minimis"—for I suspect there would be intense opposition to the abandonment of that motto. The truth is that we have simply interwoven the motto so deeply into the fabric of our civil polity that its present use may well not present that type of involvement which the First Amendment prohibits.

This general principle might also serve to insulate the various patriotic exercises and activities used in the public schools and elsewhere which, whatever may have been

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their origins, no longer have a religious purpose or meaning. The reference to divinity in the revised pledge of allegiance, for example, may merely recognize the historical fact that our Nation was believed to have been founded "under God." Thus reciting the pledge may be no more of a religious exercise than the reading aloud of Lincoln's Gettysburg Address, which contains an allusion to the same historical fact.

The principles which we reaffirm and apply today can hardly be thought novel or radical. They are, in truth, as old as the Republic itself, and have always been as integral a part of the First Amendment as the very words of that charter of religious liberty. No less applicable today than they were when first pronounced a century ago, one year after the very first court decision involving religious exercises in the public schools, are the words of a distinguished Chief Justice of the Commonwealth of Pennsylvania, Jeremiah S. Black:

> "The manifest object of the men who framed the institutions of this country, was to have a *State without religion*, and a *Church without politics*—that is to say, they meant that one should never be used as an engine for any purpose of the other, and that no man's rights in one should be tested by his opinions about the other. As the Church takes no note of men's political differences, so the State looks with equal eye on all the modes of reli-

gious faith. * * * Our fathers seem to have been perfectly sincere in their belief that the members of the Church would be more patriotic, and the citizens of the State more religious, by keeping their respective functions entirely separate." Essay on Religious Liberty, in Black, ed., Essays and Speeches of Jeremiah S. Black (1886), 53.

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Mr. Justice GOLDBERG, with whom Mr. Justice HARLAN joins, concurring.

As is apparent from the opinions filed today, delineation of the constitutionally permissible relationship between religion and government is a most difficult and sensitive task, calling for the careful exercise of both judicial and public judgment and restraint. The considerations which lead the Court today to interdict the clearly religious practices presented in these cases are to me wholly compelling; I have no doubt as to the propriety of the decision and therefore join the opinion and judgment of the Court. The singular sensitivity and concern which surround both the legal and practical judgments involved impel me, however, to add a few words in further explication, while at the same time avoiding repetition of the carefully and ably framed examination of history and authority by my Brethren.

The First Amendment's guarantees, as applied to the States through the Fourteenth Amendment, foreclose not only laws "respecting an establishment of religion" but also those "prohibiting the free exercise thereof." These two proscriptions are to be read together, and in light of the single end which they are designed to serve. The basic purpose of the religion clause of the First Amendment is to promote and assure the fullest possible scope of religious liberty and tolerance for all and to nurture the conditions which secure the best hope of attainment of that end.

The fullest realization of true religious liberty requires that government neither engage in nor compel religious practices, that it effect no favoritism among sects or between religion and nonreligion, and that it work deterrence of no religious belief. But devotion even to these simply stated objectives presents no easy course, for the unavoidable accommodations necessary to achieve the

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maximum enjoyment of each and all of them are often difficult of discernment. There is for me no simple and clear measure which by precise application can readily and invariably demark the permissible from the impermissible.

It is said, and I agree, that the attitude of government toward religion must be one of neutrality. But untutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious. Such results are not only not compelled by the Constitution, but, it seems to me, are prohibited by it.

Neither government nor this Court can or should ignore the significance of the fact that a vast portion of our people believe in and worship God and that many of our legal, political and personal values derive historically from religious teachings. Government must inevitably take cognizance of the existence of religion and, indeed, under certain circumstances the First Amendment may require that it do so. And it seems clear to me from the opinions in the present and past cases that the Court would recognize the propriety of providing military chaplains and of the teaching *about* religion, as distinguished from the teaching *of* religion, in the public schools. The examples could readily be multiplied, for both the required and the permissible accommodations between state and church frame the relation as one free of hostility or favor and productive of religious and political harmony, but without undue involvement of one in the concerns or practices of the other. To

be sure, the judgment in each case is a delicate one, but it must be made if we are to do loyal service as judges to the ultimate First Amendment objective of religious liberty.

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The practices here involved do not fall within any sensible or acceptable concept of compelled or permitted accommodation and involve the state so significantly and directly in the realm of the sectarian as to give rise to those very divisive influences and inhibitions of freedom which both religion clauses of the First Amendment preclude. The state has ordained and has utilized its facilities to engage in unmistakably religious exercises—the devotional reading and recitation of the Holy Bible—in a manner having substantial and significant import and impact. That it has selected, rather than written, a particular devotional liturgy seems to me without constitutional import. The pervasive religiosity and direct governmental involvement inhering in the prescription of prayer and Bible reading in the public schools, during and as part of the curricular day, involving young impressionable children whose school attendance is statutorily compelled, and utilizing the prestige, power, and influence of school administration, staff, and authority, cannot realistically be termed simply accommodation, and must fall within the interdiction of the First Amendment. I find nothing in the opinion of the Court which says more than this. And, of course, today's decision does not mean that all incidents of government which import of the religious are therefore and without more banned by the strictures of the Establishment Clause. As the Court declared only last Term in Engel v. Vitale, 370 U.S. 421, 435, n. 21, 82 S.Ct. 1261, 1269, 8 L.Ed.2d 601:

"There is of course nothing in the decision reached here that is inconsistent with the fact that school children and others are officially encouraged to express love for our country by reciting historical documents such as the Declaration of Independence which contain references to the Deity or by singing officially espoused anthems which include the composer's professions of faith in a Supreme Being, or

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with the fact that there are many manifestations in our public life of belief in God. Such patriotic or ceremonial occasions bear no true resemblance to the unquestioned religious exercise that the State * * * has sponsored in this instance."

The First Amendment does not prohibit practices which by any realistic measure create none of the dangers which it is designed to prevent and which do not so directly or substantially involve the state in religious exercises or in the favoring of religion as to have meaningful and practical impact. It is of course true that great consequences can grow from small beginnings, but the measure of constitutional adjudication is the ability and willingness to distinguish between real threat and mere shadow.

Mr. Justice STEWART, dissenting.

I think the records in the two cases before us are so fundamentally deficient as to make impossible an informed or responsible determination of the constitutional issues presented. Specifically, I cannot agree that on these records we can say that the Establishment Clause has necessarily been violated.[1] But I think there exist serious questions under both that provision and the Free Exercise Clause—insofar as each is imbedded in the Fourteenth Amendment—which require the remand of these cases for the taking of additional evidence.

1. It is instructive, in this connection, to examine the complaints in the two cases before us. Neither complaint attacks the challenged practices as "establishments." What both allege as the basis for their causes of actions are, rather, violations of religious liberty.

I.

The First Amendment declares that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * *." It is, I

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think, a fallacious oversimplification to regard these two provisions as establishing a single constitutional standard of "separation of church and state," which can be mechanically applied in every case to delineate the required boundaries between government and religion. We err in the first place if we do not recognize, as a matter of history and as a matter of the imperatives of our free society, that religion and government must necessarily interact in countless ways. Secondly, the fact is that while in many contexts the Establishment Clause and the Free Exercise Clause fully complement each other, there are areas in which a doctrinaire reading of the Establishment Clause leads to irreconcilable conflict with the Free Exercise Clause.

A single obvious example should suffice to make the point. Spending federal funds to employ chaplains for the armed forces might be said to violate the Establishment Clause. Yet a lonely soldier stationed at some far-away outpost could surely complain that a government which did *not* provide him the opportunity for pastoral guidance was affirmatively prohibiting the free exercise of his religion. And such examples could readily be multiplied. The short of the matter is simply that the two relevant clauses of the First Amendment cannot accurately be reflected in a sterile metaphor which by its very nature may distort rather than illumine the problems involved in a particular case. Cf. Sherbert v. Verner, 374 U.S. 398, 83 S.Ct. 1790.

II.

As a matter of history, the First Amendment was adopted solely as a limitation upon the newly created National Government. The events leading to its adoption strongly suggest that the Establishment Clause was primarily an attempt to insure that Congress not only would be powerless to establish a national church, but

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would also be unable to interfere with existing state establishments. See McGowan v. Maryland, 366 U.S. 420, 440–441, 81 S.Ct. 1101, 1112–1113, 6 L.Ed.2d 393. Each State was left free to go its own way and pursue its own policy with respect to religion. Thus Virginia from the beginning pursued a policy of disestablishmentarianism. Massachusetts, by contrast, had an established church until well into the nineteenth century.

So matters stood until the adoption of the Fourteenth Amendment, or more accurately, until this Court's decision in Cantwell v. Connecticut, in 1940. 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213. In that case the Court said: "The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws." [2]

I accept without question that the liberty guaranteed by the Fourteenth Amendment against impairment by the States embraces in full the right of free exercise of religion protected by the First Amendment, and I yield to no one in my conception of the breadth of that freedom. See Braunfeld v. Brown, 366 U.S. 599, 616, 81 S.Ct. 1144, 1152, 6 L.Ed. 2d 563 (dissenting opinion). I accept too the proposition that the Fourteenth Amendment has somehow absorbed the Establishment Clause, although it is not without irony that a constitutional provision evidently designed to leave the States free to go their own way should now have become a restriction upon their

2. 310 U.S., at 303, 60 S.Ct., at 903, 84 L. Ed. 1213. The Court's statement as to the Establishment Clause in Cantwell was dictum. The case was decided on free exercise grounds.

autonomy. But I cannot agree with what seems to me the insensitive definition of the Establishment Clause contained in the Court's opinion, nor with the different but, I think, equally mechanistic definitions contained in the separate opinions which have been filed.

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III.

Since the Cantwell pronouncement in 1940, this Court has only twice held invalid state laws on the ground that they were laws "respecting an establishment of religion" in violation of the Fourteenth Amendment. Illinois ex rel. McCollum v. Board of Education, 333 U.S. 203, 68 S.Ct. 461, 92 L.Ed. 649; Engel v. Vitale, 370 U.S. 421, 82 S.Ct. 1261, 8 L.Ed.2d 601. On the other hand, the Court has upheld against such a challenge laws establishing Sunday as a compulsory day of rest, McGowan v. Maryland, 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed. 2d 393, and a law authorizing reimbursement from public funds for the transportation of parochial school pupils. Everson v. Board of Education, 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711.

Unlike other First Amendment guarantees, there is an inherent limitation upon the applicability of the Establishment Clause's ban on state support to religion. That limitation was succinctly put in Everson v. Board of Education, 330 U.S. 1, 18, 67 S.Ct. 504, 513, 91 L.Ed. 711: "State power is no more to be used so as to handicap religions, than it is to favor them."[3] And in a later case, this Court recognized that the limitation was one which was itself compelled by the free exercise guarantee. "To hold that a state cannot consistently with the First and Fourteenth Amendments utilize its public school system to aid any or all religious faiths or sects in the dissemination of their doctrines and ideals does not * * * manifest a governmental hostility to religion or religious teachings. A manifestation of such hostility would be at war with our national tradition as embodied in the First Amendment's guaranty of the free

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exercise of religion." Illinois ex rel. McCollum v. Board of Education, 333 U.S. 203, 211–212, 68 S.Ct. 461, 465, 92 L.Ed. 649.

That the central value embodied in the First Amendment—and, more particularly, in the guarantee of "liberty" contained in the Fourteenth—is the safeguarding of an individual's right to free exercise of his religion has been consistently recognized. Thus, in the case of Hamilton v. Regents, 293 U.S. 245, 265, 55 S.Ct. 197, 205, 79 L.Ed. 343, Mr. Justice Cardozo, concurring, assumed that it was "* * * *the religious liberty* protected by the First Amendment against invasion by the nation [which] is protected by the Fourteenth Amendment against invasion by the states." (Emphasis added.) And in Cantwell v. Connecticut, supra, the purpose of those guarantees was described in the following terms: "On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion." 310 U.S., at 303, 60 S.Ct., at 903, 84 L.Ed. 1213.

It is this concept of constitutional protection embodied in our decisions which makes the cases before us such difficult ones for me. For there is involved in these cases a substantial free exercise

3. See also, in this connection, Zorach v. Clauson, 343 U.S. 306, 314, 72 S.Ct. 679, 684, 96 L.Ed. 954: "Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education nor use secular institutions to force one or some religion on any person. But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence."

claim on the part of those who affirmatively desire to have their children's school day open with the reading of passages from the Bible.

It has become accepted that the decision in Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070, upholding the right of parents to send their children to nonpublic schools, was ultimately based upon the recognition of the validity of the free exercise claim involved in that situation. It might be argued here that parents who wanted their children to be exposed to religious influences in school could, under Pierce, send their children to private or parochial

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schools. But the consideration which renders this contention too facile to be determinative has already been recognized by the Court: "Freedom of speech, freedom of the press, freedom of religion are available to all, not merely to those who can pay their own way." Murdock v. Commonwealth of Pennslyvania, 319 U.S. 105, 111, 63 S.Ct. 870, 874, 87 L.Ed. 1292.

It might also be argued that parents who want their children exposed to religious influences can adequately fulfill that wish off school property and outside school time. With all its surface persuasiveness, however, this argument seriously misconceives the basic constitutional justification for permitting the exercises at issue in these cases. For a compulsory state educational system so structures a child's life that if religious exercises are held to be an impermissible activity in schools, religion is placed at an artificial and state-created disadvantage. Viewed in this light, permission of such exercises for those who want them is necessary if the schools are truly to be neutral in the matter of religion. And a refusal to permit religious exercises thus is seen, not as the realization of state neutrality, but rather as the establishment of a religion of secularism, or at the least, as government support of the beliefs of those who think that religious exercises should be conducted only in private.

What seems to me to be of paramount importance, then, is recognition of the fact that the claim advanced here in favor of Bible reading is sufficiently substantial to make simple reference to the constitutional phrase "establishment of religion" as inadequate an analysis of the cases before us as the ritualistic invocation of the nonconstitutional phrase "separation of church and state." What these cases compel, rather, is an analysis of just what the "neutrality" is which is required by the interplay of the Establishment and Free Exercise Clauses of the First Amendment, as imbedded in the Fourteenth.

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IV.

Our decisions make clear that there is no constitutional bar to the use of government property for religious purposes. On the contrary, this Court has consistently held that the discriminatory barring of religious groups from public property is itself a violation of First and Fourteenth Amendment guarantees. Fowler v. Rhode Island, 345 U.S. 67, 73 S.Ct. 526, 97 L.Ed. 828; Niemotko v. Maryland, 340 U.S. 268, 71 S.Ct. 325, 95 L.Ed. 267. A different standard has been applied to public school property, because of the coercive effect which the use by religious sects of a compulsory school system would necessarily have upon the children involved. Illinois ex rel. McCollum v. Board of Education, 333 U.S. 203, 68 S.Ct. 461, 92 L.Ed. 649. But insofar as the McCollum decision rests on the Establishment rather than the Free Exercise Clause, it is clear that its effect is limited to religious instruction—to government support of proselytizing activities of religious sects by throwing the weight of secular authority behind the dissemination of religious tenets.[4]

4. "This is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups *to spread their faith.*" Illinois

The dangers both to government and to religion inherent in official support of instruction in the tenets of various religious sects are absent in the present cases, which involve only a reading from the Bible unaccompanied by comments which might otherwise constitute instruction. Indeed, since, from all that appears in either record, any teacher who does not wish to do so is free not to participate,[5] it cannot even be contended that some

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infinitesimal part of the salaries paid by the State are made contingent upon the performance of a religious function.

In the absence of evidence that the legislature or school board intended to prohibit local schools from substituting a different set of readings where parents requested such a change, we should not assume that the provisions before us—as actually administered—may not be construed simply as authorizing religious exercises, nor that the designations may not be treated simply as indications of the promulgating body's view as to the community's preference. We are under a duty to interpret these provisions so as to render them constitutional if reasonably possible. Compare Two Guys From Harrison-Allentown, Inc. v. McGinley, 366 U.S. 582, 592–595, 81 S.Ct. 1135, 1140–1142, 6 L.Ed.2d 551; Everson v. Board of Education, 330 U.S. 1, 4, and n. 2, 67 S.Ct. 504, 505, 506, 91 L.Ed. 711. In the Schempp case there is evidence which indicates that variations were in fact permitted by the very school there involved, and that further variations were not introduced only because of the absence of requests from parents. And in the Murray case the Baltimore rule itself contains a provision permitting another version of the Bible to be substituted for the King James version.

If the provisions are not so construed, I think that their validity under the Establishment Clause would be extremely doubtful, because of the designation of a particular religious book and a denominational prayer. But since, even if the provisions are construed as I believe they must be, I think that the cases before us must be remanded for further evidence on other issues—thus affording the plaintiffs an opportunity to prove that local variations are not in fact permitted—I shall for the balance

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of this dissenting opinion treat the provisions before us as making the variety and content of the exercises, as well as a choice as to their implementation, matters which ultimately reflect the consensus of each local school community. In the absence of coercion upon those who do not wish to participate—because they hold less strong beliefs, other beliefs, or no beliefs at all—such provisions cannot, in my view, be held to represent the type of support of religion barred by the Establishment Clause. For the only support which such rules provide for religion is the withholding of state hostility—a simple acknowledgment on the part of secular authorities that the Constitution does not require extirpation of all expression of religious belief.

V.

I have said that these provisions authorizing religious exercises are properly to be regarded as measures making possible the free exercise of religion. But it is important to stress that, strictly speaking, what is at issue here is a privilege rather than a right. In other words, the question presented is not whether exercises such as those at issue here are constitutionally compelled, but rather whether they are constitutionally

ex rel. McCollum v. Board of Education, 333 U.S. 203, 210, 68 S.Ct. 461, 464, 92 L.Ed. 649. (Emphasis added.)

5. The Pennsylvania statute was specifically amended to remove the compulsion upon teachers. Act of December 17, 1959, P.L. 1928, 24 Purdon's Pa.Stat.Ann. § 15–1516. Since the Maryland case is here on a demurrer, the issue of whether or not a teacher could be dismissed for refusal to participate seems, among many others, never to have been raised.

invalid. And that issue, in my view, turns on the question of coercion.

It is clear that the dangers of coercion involved in the holding of religious exercises in a schoolroom differ qualitatively from those presented by the use of similar exercises or affirmations in ceremonies attended by adults. Even as to children, however, the duty laid upon government in connection with religious exercises in the public schools is that of refraining from so structuring the school environment as to put any kind of pressure on a child to participate in those exercises; it is not that of providing an atmosphere in which children are kept scrupulously insulated from any awareness that some of their fellows

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may want to open the school day with prayer, or of the fact that there exist in our pluralistic society differences of religious belief.

These are not, it must be stressed, cases like Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873, in which this Court held that, in the sphere of public education, the Fourteenth Amendment's guarantee of equal protection of the laws required that race not be treated as a relevant factor. A segregated school system is not invalid because its operation is coercive; it is invalid simply because our Constitution presupposes that men are created equal, and that therefore racial differences cannot provide a valid basis for governmental action. Accommodation of religious differences on the part of the State, however, is not only permitted but required by that same Constitution.

The governmental neutrality which the First and Fourteenth Amendments require in the cases before us, in other words, is the extension of evenhanded treatment to all who believe, doubt, or disbelieve—a refusal on the part of the State to weight the scales of private choice. In these cases, therefore, what is involved is not state action based on impermissible categories, but rather an attempt by the State to accommodate those differences which the existence in our society of a variety of religious beliefs makes inevitable. The Constitution requires that such efforts be struck down only if they are proven to entail the use of the secular authority of government to coerce a preference among such beliefs.

It may well be, as has been argued to us, that even the supposed benefits to be derived from noncoercive religious exercises in public schools are incommensurate with the administrative problems which they would create. The choice involved, however, is one for each local community and its school board, and not for this Court. For, as I have said, religious exercises are not constitutionally invalid if they simply reflect differences which exist in the

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society from which the school draws its pupils. They become constitutionally invalid only if their administration places the sanction of secular authority behind one or more particular religious or irreligious beliefs.

To be specific, it seems to me clear that certain types of exercises would present situations in which no possibility of coercion on the part of secular officials could be claimed to exist. Thus, if such exercises were held either before or after the official school day, or if the school schedule were such that participation were merely one among a number of desirable alternatives,[6] it could hardly be contended that the exercises did anything more than to provide an opportunity for the voluntary expression of religious belief. On the other hand, a law which provided for religious exercises during the school day and which contained no excusal provision would obviously be unconstitutionally coercive upon those who

6. See, e. g., the description of a plan permitting religious instruction off school property contained in Illinois ex rel. McCollum v. Board of Education, 333 U.S. 203, 224, 68 S.Ct. 461, 478, 92 L.Ed. 649 (separate opinion of Mr. Justice Frankfurter).

did not wish to participate. And even under a law containing an excusal provision, if the exercises were held during the school day, and no equally desirable alternative were provided by the school authorities, the likelihood that children might be under at least some psychological compulsion to participate would be great. In a case such as the latter, however, I think we would err if we *assumed* such coercion in the absence of any evidence.[7]

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VI.

Viewed in this light, it seems to me clear that the records in both of the cases before us are wholly inadequate to support an informed or responsible decision. Both cases involve provisions which explicitly permit any student who wishes, to be excused from participation in the exercises. There is no evidence in either case as to whether there would exist any coercion of any kind upon a student who did not want to participate. No evidence at all was adduced in the Murray case, because it was decided upon a demurrer. All that we have in that case, therefore, is the conclusory language of a pleading. While such conclusory allegations are acceptable for procedural purposes, I think that the nature of the constitutional problem involved here clearly demands that no decision be made except upon evidence. In the Schempp case the record shows no more than a subjective prophecy by a parent of what he thought would happen if a request were made to be excused from participation in the exercises under the amended statute. No such request was ever made, and there is no evidence whatever as to what might or would actually happen, nor of what administrative arrangements the school actually might or could make to free from pressure of any kind those who do not want to participate in the exercises. There were no District Court findings on this issue, since the case under the amended statute was decided exclusively on Establishment Clause grounds. 201 F.Supp. 815.

What our Constitution indispensably protects is the freedom of each of us, be he Jew or Agnostic, Christian or

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Atheist, Buddhist or Freethinker, to believe or disbelieve, to worship or not worship, to pray or keep silent, according to his own conscience, uncoerced and unrestrained by government. It is conceivable that these school boards, or even all school boards, might eventually find it impossible to administer a system of religious exercises during school hours in such a way as to meet this constitutional standard—in such a way as completely to free from any kind of official coercion those who do not affirmatively want to participate.[8] But I think we must not assume that school boards so lack the qualities of inventiveness and good will as to make impossible the achievement of that goal.

I would remand both cases for further hearing.

7. Cf. "The task of separating the secular from the religious in education is one of magnitude, intricacy and delicacy. To lay down a sweeping constitutional doctrine as demanded by complainant and apparently approved by the Court, applicable alike to all school boards of the nation, * * * is to decree a uniform, rigid and, if we are consistent, an unchanging standard for countless school boards representing and serving highly localized groups which not only differ from each other but which themselves from time to time change attitudes. It seems to me that to do so is to allow zeal for our own ideas of what is good in public instruction to induce us to accept the role of a super board of education for every school district in the nation." Illinois ex rel. McCollum v. Board of Education, 333 U.S. 203, 237, 68 S.Ct. 461, 478, 92 L.Ed. 649 (concurring opinion of Mr. Justice Jackson).

8. For example, if the record in the Schempp case contained proof (rather than mere prophecy) that the timing of morning announcements by the school was such as to handicap children who did not want to listen to the Bible reading, or that the excusal provision was so administered as to carry any overtones of social inferiority, then impermissible coercion would clearly exist.

is not faithful to the Founding Fathers' purpose when it does not reflect the teaching of history:

> "This command of the Fifth Amendment . . . registers an important advance in the development of our liberty—'one of the great landmarks in man's struggle to make himself civilized.' Time has not shown that protection from the evils against which this safeguard was directed is needless or unwarranted. This constitutional protection must not be interpreted in a hostile or niggardly spirit. Too many, even those who should be better advised, view this privilege as a shelter for wrongdoers. They too readily assume that those who invoke it are either guilty of crime or commit perjury in claiming the privilege. Such a view does scant honor to the patriots who sponsored the Bill of Rights as a condition to acceptance of the Constitution by the ratifying States." *Ullmann v. United States,* 350 U.S. 422, 426–427, 76 S.Ct. 497, 500, 100 L.Ed. 511, 518 (1956) (footnotes omitted).

425 U.S. 391, 48 L.Ed.2d 39

Solomon FISHER et al., Petitioners,

v.

UNITED STATES et al.

UNITED STATES et al., Petitioners,

v.

C. D. KASMIR and Jerry A. Candy.

Nos. 74–18, 74–611.

Argued Nov. 3, 1975.

Decided April 21, 1976.

In two cases, enforcement actions were commenced by Government to compel production of accountants' documents in possession of taxpayers' attorneys. In one case, the United States District Court for the Northern District of Texas granted enforcement and the Court of Appeals for the Fifth Circuit reversed the enforcement order, 499 F.2d 444. In a second case, the District Court for the Eastern District of Pennsylvania granted enforcement, 352 F.Supp. 731, and the Court of Appeals for the Third Circuit affirmed, 500 F.2d 683. Certiorari was granted to resolve the conflict created. The Supreme Court, Mr. Justice White, held that taxpayers' Fifth Amendment privilege was not violated by enforcement of documentary summons directed toward their attorneys, for production of accountants' documents which had been transferred to attorneys in connection with an Internal Revenue Service investigation, whether or not the Amendment would have barred a subpoena directing taxpayers to produce documents while they were in taxpayers' hands, and fact that attorneys were agents of taxpayers did not change result; and that compliance with a summons directing taxpayers to produce accountants' documents, which were not taxpayers' "private papers," would involve no incriminating testimony within protection of Fifth Amendment, and thus such documents were not, under theory of attorney-client privilege, immune from production in hands of taxpayers' attorneys to whom they had been transferred in connection with Internal Revenue Service investigation.

Judgment of Court of Appeals for Fifth Circuit in No. 74–611 reversed; judgment of Court of Appeals for Third Circuit in No. 74–18 affirmed.

Mr. Justice Brennan concurred in the judgment and filed an opinion.

Mr. Justice Marshall concurred in the judgment and filed an opinion.

1. Witnesses ⇐298

Enforcement of a summons to produce documents against a taxpayer's lawyer would not "compel" taxpayer to do anything and would not compel him to be a

"witness" against himself within Fifth Amendment; taxpayers' personal privilege against self-incrimination was in no way decreased by transfer of documents to their attorneys, and taxpayers retained any privilege they had. U.S.C.A.Const. Amend. 5.

2. Criminal Law ⇐393(1)

Fifth Amendment is limited to prohibiting the use of physical or moral compulsion exerted on the person asserting the privilege. U.S.C.A.Const. Amend. 5.

3. Witnesses ⇐298

Taxpayers' Fifth Amendment privilege was not violated by enforcement of documentary summonses directed toward their attorneys for production of accountants' documents which had been transferred to attorneys in connection with an Internal Revenue Service investigation, whether or not the Amendment would have barred a subpoena directing taxpayers to produce documents while they were in taxpayers' hands, and fact that attorneys were agents of taxpayers did not change result, where constructive possession by taxpayers was not so clear nor relinquishment of possession so temporary and insignificant as to leave personal compulsion on taxpayers substantially intact. U.S.C.A.Const. Amend. 5.

4. Criminal Law ⇐412(1)

Under appropriate safeguards, private incriminating statements of an accused may be overheard and used in evidence, if they are not compelled at the time they were uttered.

5. Criminal Law ⇐393(1)

Disclosure of private information may be compelled if immunity removes the risk of incrimination. U.S.C.A.Const. Amend. 5.

6. Criminal Law ⇐393(1)

The Fifth Amendment's strictures, unlike the Fourth's, are not removed by showing reasonableness. U.S.C.A.Const. Amends. 4, 5.

7. Witnesses ⇐297(1)

Fifth Amendment protects against compelled self-incrimination, not the disclosure of private information. U.S.C.A. Const. Amend. 5.

8. Witnesses ⇐298

Enforcement of documentary subpoenas directed to taxpayers' attorneys for production of accountants' documents delivered to attorneys by taxpayers was not precluded on theory that attorneys were required to respect confidences of clients who had a reasonable expectation of privacy for records in hands of attorneys and therefore did not forfeit Fifth Amendment privilege with respect to records by transferring them in order to obtain legal advice. U.S.C.A.Const. Amend. 5.

9. Witnesses ⇐217

The attorney-client privilege may be raised by the attorney.

10. Witnesses ⇐201(1)

Confidential disclosures by client to an attorney made in order to obtain legal assistance are privileged; the purpose of the privilege is to encourage clients to make full disclosure to their attorneys; however, privilege protects only those disclosures, necessary to obtain informed legal advice, which might not have been obtained absent the privilege.

11. Internal Revenue ⇐1458

Where taxpayer transferred possession of documents from himself to his attorney, in order to obtain legal assistance in tax investigations, the papers, if unobtainable by summons from the client, were unobtainable by summons directed to the attorney by reason of the attorney-client privilege.

12. Criminal Law ⇐393(1)

Fifth Amendment does not independently proscribe the compelled production of every sort of incriminating evidence but applies only when the accused is compelled to make a testimonial communication that is incriminating. U.S.C.A.Const. Amend. 5.

13. Witnesses ⇐298

Fifth Amendment privilege protects a person only against being incriminated by his own compelled testimonial communications, as opposed to compelled production of incriminating documents, even where document was written by person asserting the privilege, if he was not compelled to write it. U.S.C.A.Const. Amend. 5.

14. Witnesses ⇐298

However incriminating the contents of accountants' work papers might be, the act of producing them, the only thing which taxpayers were compelled to do, would not itself involve testimonial self-incrimination. U.S.C.A.Const. Amend. 5.

15. Internal Revenue ⇐1458

Compliance with a summons directing taxpayers to produce accountants' documents, which were not taxpayers' "private papers," would involve no incriminating testimony within protection of Fifth Amendment, and thus such documents were not, under theory of attorney-client privilege, immune from production in hands of taxpayers' attorneys to whom they had been transferred in connection with Internal Revenue Service investigation. U.S.C.A. Const. Amend. 5.

Syllabus *

In each of these cases taxpayers, who were under investigation for possible civil or criminal liability under the federal income tax laws, after having obtained from their respective accountants certain documents relating to the accountants' preparation of their tax returns, transferred the documents to their respective attorneys to assist the taxpayers in connection with the investigations. Subsequently, the Internal Revenue Service served summonses on the attorneys directing them to produce the documents, but the attorneys refused to comply. The Government then brought enforcement actions, and in each case the District Court ordered the summons enforced. In No. 74–18 the Court of Appeals affirmed, holding that the taxpayers had never acquired a possessory interest in the documents and that the documents were not immune from production in the attorney's hands. But in No. 74–611 the Court of Appeals reversed, holding that by virtue of the Fifth Amendment the documents would have been privileged from production pursuant to a summons directed to the taxpayer if he had retained possession, and that, in light of the attorney-client relationship, the taxpayer retained such privilege after transferring the documents to his attorney. *Held*:

1. Compelled production of the documents in question from the attorneys does not implicate whatever Fifth Amendment privilege the taxpayer-clients might have enjoyed from being themselves compelled to produce the documents. Pp. 1573–1576.

(a) Whether or not the Fifth Amendment would have barred a subpoena directing the taxpayers to produce the documents while they were in their hands, the taxpayers' privilege under that Amendment is not violated by enforcing the summonses because enforcement against a taxpayer's lawyer would not "compel" the taxpayer to do anything, and certainly would not compel him to be a "witness" against himself, and the fact that the attorneys are agents of the taxpayers does not change this result. *Couch v. United States*, 409 U.S. 322, 93 S.Ct. 611, 34 L.Ed.2d 548. Pp. 1573–1574. 392

(b) These cases do not present a situation where constructive possession of the documents in question is so clear or relinquishment of possession so temporary and insignificant as to leave the personal compulsion upon the taxpayer substantially intact, since the documents sought were obtainable without personal compulsion upon the taxpayers. *Couch, supra.* P. 1574.

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499, 505.

(c) The taxpayers, by transferring the documents to their attorneys, did not lose any Fifth Amendment privilege they ever had not to be compelled to testify against themselves and not to be compelled themselves to produce private papers in their possession, and *this* personal privilege was in no way decreased by the transfer. Pp. 1574–1575.

(d) Even though the taxpayers, after transferring the documents to their attorneys, may have had a reasonable expectation of privacy with respect to the documents, the Fifth Amendment does not protect private information obtained without compelling self-incriminating testimony. Pp. 1575–1576.

2. Although the attorney-client privilege applies to documents in the hands of an attorney which would have been privileged in the hands of the client by reason of the Fifth Amendment, the taxpayer-clients in these cases would not be protected by that Amendment from producing the documents in question, because production of such documents involves no incriminating testimony and therefore the documents in the hands of the taxpayers' attorneys were not immune from production. Pp. 1576–1582.

(a) The Fifth Amendment does not independently proscribe the compelled production of every sort of incriminating evidence but applies only when the accused is compelled to make a *testimonial* communication that is incriminating. P. 1579.

(b) Here, however incriminating the contents of the accountants' workpapers might be, the act of producing them—the only thing that the taxpayers are compelled to do—would not itself involve testimonial self-incrimination, and implicitly admitting the existence and possession of the papers does not rise to the level of testimony within the protection of the Fifth Amendment. Pp. 1579–1582.

No. 74–18, 500 F.2d 683, affirmed; No. 74–611, 499 F.2d 444, reversed.

Lawrence G. Wallace, Washington, D. C., for the U. S. [393]

Robert E. Goodfriend for Kasmir et al.

Richard L. Bazelon, Philadelphia, Pa., for Fisher et al.

Mr. Justice WHITE delivered the opinion of the Court.

In these two cases we are called upon to decide whether a summons directing an attorney to produce documents delivered to him by his client in connection with the attorney-client relationship is enforceable over claims that the documents were constitutionally immune from summons in the hands of the client and retained that immunity in the hands of the attorney.

I

In each case, an Internal Revenue agent visited the taxpayer or taxpayers [1] and interviewed them in connection with an investigation of possible civil or criminal liability under the federal income tax laws. [394] Shortly after the interviews—one day later in No. 74–611 and a week or two later in No. 74–18—the taxpayers obtained from their respective accountants certain documents relating to the preparation by the accountants of their tax returns. Shortly after obtaining the documents—later the same day in No. 74–611 and a few weeks later in No. 74–18—the taxpayers transferred the documents to their lawyers—respondent Kasmir and petitioner Fisher, respectively—each of whom was retained to assist the taxpayer in connection with the investigation. Upon learning of the whereabouts of the documents, the Internal Revenue Service served summonses on the attorneys directing them to produce documents listed therein. In No. 74–611, the documents were described as "the following records of Tannebaum Bindler & Lewis [the accounting firm].

1. In No. 74–18, the taxpayers are husband and wife who filed a joint return. In No. 74–611, the taxpayer filed an individual return.

"1. Accountant's workpapers pertaining to Dr. E. J. Mason's books and records of 1969, 1970 and 1971.[2]

"2. Retained copies of E. J. Mason's income tax returns for 1969, 1970 and 1971.

"3. Retained copies of reports and other correspondence between Tannebaum Bindler & Lewis and Dr. E. J. Mason during 1969, 1970 and 1971."

In No. 74–18, the documents demanded were analyses by the accountant of the taxpayers' income and expenses which had been copied by the accountant from the taxpayers' canceled checks and deposit re- 395 ceipts.[3] In No. 74–611, a summons was also served on the accountant directing him to appear and testify concerning the documents to be produced by the lawyer. In each case, the lawyer declined to comply with the summons directing production of the documents, and enforcement actions were commenced by the Government under 26 U.S.C. §§ 7402(b) and 7604(a). In No. 74–611, the attorney raised in defense of the enforcement action the taxpayer's accountant-client privilege, his attorney-client privilege, and his Fourth and Fifth Amendment rights. In No. 74–18, the attorney claimed that enforcement would involve compulsory self-incrimination of the taxpayers in violation of their Fifth Amendment privilege, would involve a seizure of the papers without necessary compliance with the Fourth Amendment, and would violate the taxpayers' right to communicate in confidence with their attorney. In No. 74–18 the taxpayers intervened and made similar claims.

In each case the summons was ordered enforced by the District Court and its order was stayed pending appeal. In No. 74–18, 500 F.2d 683 (CA3 1974), petitioners' appeal raised, in terms, only their Fifth Amendment claim, but they argued in connection with that claim that enforcement of the summons would involve a violation of the taxpayers' reasonable expectation of privacy and particularly so in light of the confidential relationship of attorney to client. The Court of Appeals for the Third Circuit after reargument en banc affirmed the enforcement order, holding that the taxpayers had never acquired a possessory interest in the documents and that the papers were not immune in the hands of the attorney. In No. 74–611, a divided panel of the Court of Appeals for the Fifth Circuit reversed the enforcement order, 499 F.2d 444 (1974). The court reasoned that by virtue of the Fifth Amendment the documents would have been privileged from production pur- 396 suant to summons directed to the taxpayer had he retained possession and, in light of the confidential nature of the attorney-client relationship, the taxpayer retained, after the transfer to his attorney, "a legitimate expectation of privacy with regard to the materials he placed in his attorney's custody, that he retained constructive possession of the evidence, and thus . . . retained Fifth Amendment protection."[4] *Id.*, at 453. We granted certiorari to resolve the conflict created. 420 U.S. 906, 95 S.Ct. 824, 42 L.Ed.2d 835 (1975). Because in our view the documents were not privileged either in the hands of the lawyers or of their clients, we affirm the judgment of the Third Circuit in No. 74–18 and reverse the judgment of the Fifth Circuit in No. 74–611.

II

[1, 2] All of the parties in these cases and the Court of Appeals for the Fifth Circuit have concurred in the proposition that if the Fifth Amendment would have excused a *taxpayer* from turning over the accountant's papers had he possessed them,

2. The "books and records" concerned the taxpayer's large medical practice.

3. The husband taxpayer's checks and deposit receipts related to his textile waste business. The wife's related to her women's wear shop.

4. The respondents in No. 74–611 did not, in terms, rely on the attorney-client privilege or the Fourth Amendment before the Court of Appeals.

the *attorney* to whom they are delivered for the purpose of obtaining legal advice should also be immune from subpoena. Although we agree with this proposition for the reasons set forth in Part III, *infra*, we are convinced that, under our decision in *Couch v. United States*, 409 U.S. 322, 93 S.Ct. 611, 34 L.Ed.2d 548 (1973), it is not the taxpayer's Fifth Amendment privilege that would excuse the *attorney* from production.

The relevant part of that Amendment provides:

> "No person . . . shall be *compelled* in any criminal case to be a *witness against himself*." (Emphasis added.)

397 The taxpayer's privilege under this Amendment is not violated by enforcement of the summonses involved in these cases because enforcement against a taxpayer's lawyer would not "compel" the taxpayer to do anything—and certainly would not compel him to be a "witness" against himself. The Court has held repeatedly that the Fifth Amendment is limited to prohibiting the use of "physical or moral compulsion" exerted on the person asserting the privilege, *Perlman v. United States*, 247 U.S. 7, 15, 38 S.Ct. 417, 420, 62 L.Ed. 950, 956 (1918); *Johnson v. United States*, 228 U.S. 457, 458, 33 S.Ct. 572, 57 L.Ed. 919, 920 (1913); *Couch v. United States, supra*, 409 U.S. 322, at 328, 336, 93 S.Ct. 611, at 615, 619, 34 L.Ed.2d 548, at 554, 558. See also *Holt v. United States*, 218 U.S. 245, 252–253, 31 S.Ct. 2, 6, 54 L.Ed. 1021, 1030 (1910); *United States v. Dionisio*, 410 U.S. 1, 93 S.Ct. 764, 35 L.Ed.2d 67 (1973); *Schmerber v. California*, 384 U.S. 757, 765, 86 S.Ct. 1826, 1832, 16 L.Ed.2d 908, 916 (1966); *Burdeau v. McDowell*, 256 U.S. 465, 476, 41 S.Ct. 574, 576, 65 L.Ed. 1048, 1051 (1921); *California Bankers Assn. v. Shultz*, 416 U.S. 21, 55, 94 S.Ct. 1494, 1514, 39 L.Ed.2d 812, 836 (1974). In *Couch v. United States, supra*, we recently ruled that the Fifth Amendment rights of a taxpayer were not violated by the enforcement of a documentary summons directed to her accountant and requiring production of the taxpayer's own records in the possession of the accountant. We did so on the ground that in such a case "the ingredient of personal compulsion against an accused is lacking." 409 U.S., at 329, 93 S.Ct., at 616, 34 L.Ed.2d, at 554.

[3] Here, the taxpayers are compelled to do no more than was the taxpayer in *Couch*. The taxpayers' Fifth Amendment privilege is therefore not violated by enforcement of the summonses directed toward their attorneys. This is true whether or not the Amendment would have barred a subpoena directing the taxpayer to produce the documents while they were in his hands.

The fact that the attorneys are agents of the taxpayers does not change this result. *Couch* held as much, since the accountant there was also the taxpayer's agent, and in this respect reflected a longstanding view. In *Hale v. Henkel*, 201 U.S. 43, 69–70, 26 398 S.Ct. 370, 377, 50 L.Ed. 652, 663 (1906), the Court said that the privilege "was never intended to permit [a person] to plead the fact that some third person might be incriminated by his testimony, even though he were the agent of such person . . . . [T]he Amendment is limited to a person who shall be compelled in any criminal case to be a witness against *himself*." (Emphasis in original.) "It is extortion of information from the accused himself that offends our sense of justice." *Couch v. United States, supra*, 409 U.S., at 328, 93 S.Ct., at 616, 34 L.Ed.2d, at 554. Agent or no, the lawyer is not the taxpayer. The taxpayer is the "accused," and nothing is being extorted from him.

Nor is this one of those situations, which *Couch* suggested might exist, where constructive possession is so clear or relinquishment of possession so temporary and insignificant as to leave the personal compulsion upon the taxpayer substantially intact. 409 U.S., at 333, 93 S.Ct., at 618, 34 L.Ed.2d, at 556. In this respect we see no difference between the delivery to the attorneys in these cases and delivery to the accountant in the *Couch* case. As was true in *Couch*, the documents sought were obtainable without personal compulsion on the accused.

Respondents in No. 74–611 and petitioners in No. 74–18 argue, and the Court of Appeals for the Fifth Circuit apparently agreed, that if the summons was enforced, the taxpayers' Fifth Amendment privilege would be, but should not be, lost solely because they gave their documents to their lawyers in order to obtain legal advice. But this misconceives the nature of the constitutional privilege. The Amendment protects a person from being compelled to be a witness against himself. Here, the taxpayers retained any privilege they ever had not to be compelled to testify against themselves and not to be compelled themselves to produce private papers in their possession. *This* personal privilege was in no way decreased by the transfer. It is
399 simply that by reason of the transfer of the documents to the attorneys, those papers may be subpoenaed without compulsion on the taxpayer. The protection of the Fifth Amendment is therefore not available. "A party is privileged from producing evidence but not from its production." *Johnson v. United States, supra*, 228 U.S., at 458, 33 S.Ct., at 572, 57 L.Ed., at 920.

The Court of Appeals for the Fifth Circuit suggested that because legally and ethically the attorney was required to respect the confidences of his client, the latter had a reasonable expectation of privacy for the records in the hands of the attorney and therefore did not forfeit his Fifth Amendment privilege with respect to the records by transferring them in order to obtain legal advice. It is true that the Court has often stated that one of the several purposes served by the constitutional privilege against compelled testimonial self-incrimination is that of protecting personal privacy. See, e. g., *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55, 84 S.Ct. 1594, 1596, 12 L.Ed.2d 678, 681 (1964); *Couch v. United States, supra*, 409 U.S. 322, at 332, 335–336, 93 S.Ct. 611, at 617, 619–620, 34 L.Ed.2d 548, at 556, 558–559; *Tehan v. United States ex rel. Shott*, 382 U.S. 406, 416, 86 S.Ct. 459, 465, 15 L.Ed.2d 453, 460 (1966); *Davis v. United States*, 328 U.S. 582, 587, 66 S.Ct. 1256, 1258, 90 L.Ed. 1453, 1456 (1946). But the Court has never suggested that every invasion of privacy violates the privilege. Within the limits imposed by the language of the Fifth Amendment, which we necessarily observe, the privilege truly serves privacy interests; but the Court has never on any ground, personal privacy included, applied the Fifth Amendment to prevent the otherwise proper acquisition or use of evidence which, in the Court's view, did not involve compelled testimonial self-incrimination of some sort.[5]

[4–6] The proposition that the Fifth 400
Amendment protects private information obtained without compelling self-incriminating testimony is contrary to the clear statements of this Court that under appropriate safeguards private incriminating statements of an accused may be overheard and used in evidence, if they are not compelled at the time they were uttered, *Katz v. United States*, 389 U.S. 347, 354, 88 S.Ct. 507, 512, 19 L.Ed.2d 576, 583 (1967); *Osborn v. United States*, 385 U.S. 323, 329–330, 87 S.Ct. 429, 432–433, 17 L.Ed.2d 394, 399–400 (1966); and *Berger v. New York*, 388 U.S. 41, 57, 87 S.Ct. 1873, 1882, 18 L.Ed.2d 1040, 1051 (1967); cf. *Hoffa v. United States*, 385

5. There is a line of cases in which the Court stated that the Fifth Amendment was offended by the use in evidence of documents or property seized in violation of the Fourth Amendment. *Gouled v. United States*, 255 U.S. 298, 306, 41 S.Ct. 261, 264, 65 L.Ed. 647, 651 (1921); *Agnello v. United States*, 269 U.S. 20, 33–34, 46 S.Ct. 4, 6–7, 70 L.Ed. 145, 149–150 (1925); *United States v. Lefkowitz*, 285 U.S. 452, 466–467, 52 S.Ct. 420, 424, 76 L.Ed. 877, 883 (1932); *Mapp v. Ohio*, 367 U.S. 643, 661, 81 S.Ct. 1684, 1694, 6 L.Ed.2d 1081, 1093 (1961) (Black, J., concurring). But the Court purported to find elements of compulsion in such situations. "In either case he is the unwilling source of the evidence, and the Fifth Amendment forbids that he shall be compelled to be a witness against himself in a criminal case." *Gouled v. United States, supra*, 255 U.S., at 306, 41 S.Ct., at 264, 65 L.Ed., at 651. In any event the predicate for those cases, lacking here, was a violation of the Fourth Amendment. Cf. *Burdeau v. McDowell, supra*, 256 U.S. 465, 475–476, 41 S.Ct. 574, 576, 65 L.Ed. 1048, 1050–1051 (1921).

U.S. 293, 304, 87 S.Ct. 408, 414, 17 L.Ed.2d 374, 383 (1966); and that disclosure of private information may be compelled if immunity removes the risk of incrimination. *Kastigar v. United States*, 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972). If the Fifth Amendment protected generally against the obtaining of private information from a man's mouth or pen or house, its protections would presumably not be lifted by probable cause and a warrant or by immunity. The privacy invasion is not mitigated by immunity; and the Fifth Amendment's strictures, unlike the Fourth's, are not removed by showing reasonableness. The Framers addressed the subject of personal privacy directly in the Fourth Amendment. They struck a balance so that when the State's reason to believe incriminating evidence will be found becomes sufficiently great, the invasion of privacy becomes justified and a warrant to search and seize will issue. They did not seek in still another Amendment—the Fifth—to achieve a general protection of privacy but to deal with the more specific issue of compelled self-incrimination.

401 [7, 8] We cannot cut the Fifth Amendment completely loose from the moorings of its language, and make it serve as a general protector of privacy—a word not mentioned in its text and a concept directly addressed in the Fourth Amendment. We adhere to the view that the Fifth Amendment protects against "compelled self-incrimination, not [the disclosure of] private information." *United States v. Nobles*, 422 U.S. 225, 233 n. 7, 95 S.Ct. 2160, 2167, 45 L.Ed.2d 141 (1975).

Insofar as private information not obtained through compelled self-incriminating testimony is legally protected, its protection stems from other sources[6]—the Fourth Amendment's protection against seizures without warrant or probable cause and against subpoenas which suffer from "too much indefiniteness or breadth in the things required to be 'particularly described,'" *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 208, 66 S.Ct. 494, 505, 90 L.Ed. 614, 629 (1946); *In re Horowitz*, 482 F.2d 72, 75–80 (CA2 1973) (Friendly, J.); the First Amendment, see *NAACP v. Alabama*, 357 U.S. 449, 462, 78 S.Ct. 1163, 1171, 2 L.Ed.2d 1488, 1499 (1958); or evidentiary privileges such as the attorney-client privilege.[7]

III 402

[9] Our above holding is that compelled production of documents from an attorney does not implicate whatever Fifth Amendment privilege the taxpayer might have enjoyed from being compelled to produce them himself. The taxpayers in these cases, however, have from the outset consistently urged that they should not be forced to expose otherwise protected documents to summons simply because they have sought legal advice and turned the papers over to their attorneys. The Government appears to agree unqualifiedly. The difficulty is that the taxpayers have erroneously relied on the Fifth Amendment without urging the attorney-client privilege in so many words. They have nevertheless invoked the relevant body of law and policies that govern the attorney-client privi-

6. In *Couch v. United States*, 409 U.S. 322, 93 S.Ct. 611, 34 L.Ed.2d 548 (1973), on which taxpayers rely for their claim that the Fifth Amendment protects their "legitimate expectation of privacy," the Court differentiated between the things protected by the Fourth and Fifth Amendments. "We hold today that no Fourth or Fifth Amendment claim can prevail where, as in this case, there exists no legitimate expectation of privacy and no semblance of governmental compulsion against the person of the accused." *Id.*, 409 U.S., at 336, 93 S.Ct., at 620, 34 L.Ed.2d, at 558.

7. The taxpayers and their attorneys have not raised arguments of a Fourth Amendment nature before this Court and could not be successful if they had. The summonses are narrowly drawn and seek only documents of unquestionable relevance to the tax investigation. Special problems of privacy which might be presented by subpoena of a personal diary, *United States v. Bennett*, 409 F.2d 888, 897 (CA2 1969) (Friendly, J.), are not involved here.

First Amendment values are also plainly not implicated in these cases.

lege. In this posture of the case, we feel obliged to inquire whether the attorney-client privilege applies to documents in the hands of an attorney which would have been privileged in the hands of the client by reason of the Fifth Amendment.[8]

403 [10, 11] Confidential disclosures by a client to an attorney made in order to obtain legal assistance are privileged. 8 J. Wigmore, Evidence, § 2292 (McNaughton rev. 1961) (hereinafter Wigmore); McCormick § 87, p. 175. The purpose of the privilege is to encourage clients to make full disclosure to their attorneys. 8 Wigmore § 2291, and § 2306, p. 590; McCormick § 87, p. 175, § 92, p. 192; *Baird v. Koerner*, 279 F.2d 623 (CA9 1960); *Modern Woodmen of America v. Watkins*, 132 F.2d 352 (CA5 1942); *Prichard v. United States*, 181 F.2d 326 (CA6) aff'd, *per curiam*, 339 U.S. 974, 70 S.Ct. 1029, 94 L.Ed. 1380 (1950); *Schwimmer v. United States*, 232 F.2d 855 (CA8 1956); *United States v. Goldfarb*, 328 F.2d 280 (CA6 1964). As a practical matter, if the client knows that damaging information could more readily be obtained from the attorney following disclosure than from himself in the absence of disclosure, the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice. However, since the privilege has the effect of withholding relevant information from the fact-finder, it applies only where necessary to achieve its purpose. Accordingly it protects only those disclosures—necessary to obtain informed legal advice—which might not have been made absent the privilege. *In re Horowitz, supra*, 482 F.2d 72, at 81 (Friendly, J.); *United States v. Goldfarb, supra*, 328 F.2d 280; 8 Wigmore, § 2291, p. 554; McCormick, § 89, p. 185. This Court and the lower courts have thus uniformly held that pre-existing documents which could have been obtained by court process from the client when he was in possession may also be obtained from the attorney by similar process following transfer by the client in order to obtain more informed legal 404 advice. *Grant v. United States*, 227 U.S. 74, 79–80, 33 S.Ct. 190, 192, 57 L.Ed. 423, 426 (1913); 8 Wigmore § 2307 and cases there cited; McCormick § 90, p. 185; *Falsone v. United States*, 205 F.2d 734 (CA5 1953); *Sovereign Camp, W.O.W. v. Reed*, *208 Ala.* 457, 94 So. 910 (1922); *Andrews v. Mississippi R. Co.*, 14 Ind. 169, 98 N.E. 49 (1860); *Palatini v. Sarian*, 15 N.J.Super. 34, 83 A.2d 24 (1951); *Pearson v. Yoder*, 39 Okl. 105, 134 P. 421 (1913); *State ex rel. Sowers v. Olwell*, 64 Wash.2d 828, 394 P.2d 681 (1964). The purpose of the privilege requires no broader rule. Pre-existing documents obtainable from the client are not appreciably easier to obtain from the attorney after transfer to him. Thus, even absent the attorney-client privilege, clients will not be discouraged from disclosing the documents to the attorney, and their ability to obtain informed legal advice will remain unfettered. It is otherwise if the documents are not obtainable by subpoena *duces tecum* or summons while in the exclusive possession of the client, for the client will then be reluctant to transfer possession to the lawyer unless the documents are also privileged

8. Federal Rule Evid. 501, effective January 2, 1975, provides that with respect to privileges the United States district courts "shall be governed by the principles of the common law . . . *interpreted . . . in the light of reason* and experience." Thus, whether or not Rule 501 applies to this case, the attorney-client privilege issue is governed by the principles and authorities discussed and cited *infra*. Fed. Rule Crim.Proc. 26.

In No. 74–611, the taxpayer did not intervene, and his rights have been asserted only through his lawyer. The parties disagree on the question whether an attorney may claim the Fifth Amendment privilege of his client. We need not resolve this question. The only privilege of the taxpayer involved here is the attorney-client privilege, and it is universally accepted that the attorney-client privilege may be raised by the attorney, C. McCormick, Evidence *§ 92, p. 193, § 94, p. 197 (2d ed. 1972)* (hereinafter McCormick); *Republic Gear Co. v. Borg-Warner Corp.*, 381 F.2d 551 (CA2 1967); *Bouschor v. United States*, 316 F.2d 451 (CA8 1963); *Colton v. United States*, 306 F.2d 633 (CA2 1962); *Schwimmer v. United States*, 232 F.2d 855 (CA8), cert. denied, 352 U.S. 833, 77 S.Ct. 48, 1 L.Ed.2d 52 (1956); *Baldwin v. Commissioner*, 125 F.2d 812 (CA9 1942).

in the latter's hands. Where the transfer is made for the purpose of obtaining legal advice, the purposes of the attorney-client privilege would be defeated unless the privilege is applicable. "It follows, then, that *when the client himself would be privileged* from production of the document, either as a party at common law . . . or as exempt from self-incrimination, the attorney having possession of the document is not bound to produce." 8 Wigmore § 2307, p. 592. Lower courts have so held. *Id.*, § 2307, p. 592 n. 1, and cases there cited; *United States v. Judson*, 322 F.2d 460, 466 (CA9 1963); *Colton v. United States*, 306 F.2d 633, 639 (CA2 1962). This proposition was accepted by the Court of Appeals for the Fifth Circuit below, is asserted by petitioners in No. 74–18 and respondents in No. 74–611, and was conceded by the Government in its brief and at oral argument. Where the transfer to the attorney is for the purpose of obtaining legal advice, we agree with it.

Since each taxpayer transferred possession of the documents in question from himself to his attorney in order to obtain legal assistance in the tax investigations in question, the papers, if unobtainable by summons from the client, are unobtainable by summons directed to the attorney by reason of the attorney-client privilege. We accordingly proceed to the question whether the documents could have been obtained by summons addressed to the taxpayer while the documents were in his possession. The only bar to enforcement of such summons asserted by the parties or the courts below is the Fifth Amendment's privilege against self-incrimination. On this question the Court of Appeals for the Fifth Circuit in No. 74–611 is at odds with the Court of Appeals for the Second Circuit in *United States v. Beattie*, 522 F.2d 267 (1975), cert. pending, Nos. 75–407, 75–700.

IV

The proposition that the Fifth Amendment prevents compelled production of documents over objection that such production might incriminate stems from *Boyd v. United States*, 116 U.S. 616, 68 S.Ct. 524, 29 L.Ed. 746 (1886). *Boyd* involved a civil forfeiture proceeding brought by the Government against two partners for fraudulently attempting to import 35 cases of glass without paying the prescribed duty. The partnership had contracted with the Government to furnish the glass needed in the construction of a Government building. The glass specified was foreign glass, it being understood that if part or all of the glass was furnished from the partnership's existing duty-paid inventory, it could be replaced by duty-free imports. Pursuant to this arrangement, 29 cases of glass were imported by the partnership duty free. The partners then represented that they were entitled to duty-free entry of an additional 35 cases which were soon to arrive. The forfeiture action concerned these 35 cases. The Government's position was that the partnership had replaced all of the glass used in construction of the Government building when it imported the 29 cases. At trial, the Government obtained a court order directing the partners to produce an invoice the partnership had received from the shipper covering the previous 29-case shipment. The invoice was disclosed, offered in evidence, and used, over the Fifth Amendment objection of the partners, to establish that the partners were fraudulently claiming a greater exemption from duty than they were entitled to under the contract. This Court held that the invoice was inadmissible and reversed the judgment in favor of the Government. The Court ruled that the Fourth Amendment applied to court orders in the nature of subpoenas *duces tecum* in the same manner in which it applies to search warrants, *id.*, at 622, 6 S.Ct., at 528, 29 L.Ed., at 748; and that the Government may not, consistent with the Fourth Amendment, seize a person's documents or other property as evidence unless it can claim a proprietary interest in the property superior to that of the person from whom the property is obtained. *Id.*, at 623–624, 6 S.Ct., at 528–529, 29 L.Ed., at 748. The invoice in question was thus held to

have been obtained in violation of the Fourth Amendment. The Court went on to hold that the accused in a criminal case or the defendant in a forfeiture action could not be forced to produce evidentiary items without violating the Fifth Amendment as well as the Fourth. More specifically, the Court declared, "a compulsory production of the private books and papers of the owner of goods sought to be forfeited . . . is compelling him to be a witness against
1407 himself, within the meaning of the Fifth Amendment to the Constitution." *Id.*, at 634–635, 6 S.Ct., at 534, 29 L.Ed., at 752. Admitting the partnership invoice into evidence had violated both the Fifth and Fourth Amendments.

Among its several pronouncements, *Boyd* was understood to declare that the seizure, under warrant or otherwise, of any purely evidentiary materials violated the Fourth Amendment and that the Fifth Amendment rendered these seized materials inadmissible. *Gouled v. United States*, 255 U.S. 298, 41 S.Ct. 261, 65 L.Ed. 647 (1921); *Agnello v. United States*, 269 U.S. 20, 46 S.Ct. 4, 70 L.Ed. 145 (1925); *United States v. Lefkowitz*, 285 U.S. 452, 52 S.Ct. 420, 76 L.Ed. 877 (1932). That rule applied to documents as well as to other evidentiary items—"[t]here is no special sanctity in papers, as distinguished from other forms of property, to render them immune from search and seizure, if only the fall within the scope of the principles of the cases in which other property may be seized. . . ." *Gouled v. United States, supra*, 255 U.S., at 309, 41 S.Ct., at 265, 65 L.Ed., at 652. Private papers taken from the taxpayer, like other "mere evidence," could not be used against the accused over his Fourth and Fifth Amendment objections.

Several of Boyd's express or implicit declarations have not stood the test of time. The application of the Fourth Amendment to subpoenas was limited by *Hale v. Henkel*, 201 U.S. 43, 26 S.Ct. 370, 50 L.Ed. 652 (1906), and more recent cases. See, *e. g.*, *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 66 S.Ct. 494, 90 L.Ed. 614 (1946). Purely evidentiary (but "nontestimonial") materials, as well as contraband and fruits and instrumentalities of crime, may now be searched for and seized under proper circumstances, *Warden v. Hayden*, 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967).[9] Also, any notion that "testimonial" evidence may never be seized and used in evidence is inconsistent with *Katz v. United States*, 1408 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967); *Osborn v. United States*, 385 U.S. 323, 87 S.Ct. 429, 439, 17 L.Ed.2d 394 (1966); and *Berger v. New York*, 388 U.S. 41, 87 S.Ct. 1873, 18 L.Ed.2d 1040 (1967), approving the seizure under appropriate circumstances of conversations of a person suspected of crime. See also *Marron v. United States*, 275 U.S. 192, 48 S.Ct. 74, 72 L.Ed. 231 (1927).

[12] It is also clear that the Fifth Amendment does not independently proscribe the compelled production of every sort of incriminating evidence but applies only when the accused is compelled to make a *testimonial* communication that is incriminating. We have, accordingly, declined to extend the protection of the privilege to the giving of blood samples, *Schmerber v. California*, 384 U.S. 757, 763–764, 86 S.Ct. 1826, 1831–1832, 16 L.Ed.2d 908, 915–916 (1966);[10] to the giving of handwriting exemplars, *Gilbert v. California*, 388 U.S. 263, 265–267, 87 S.Ct. 1951, 1952–1954, 18 L.Ed.2d 1178, 1181–1183 (1967); voice exemplars, *United States v. Wade*, 388 U.S.

9. Citing to *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966), *Warden v. Hayden*, 387 U.S., at 302–303, 87 S.Ct., at 1648, 18 L.Ed.2d, at 789, reserved the question "whether there are items of evidential value whose very nature precludes them from being the object of a reasonable search and seizure."

10. The Court's holding was: "Since the blood test evidence, although an incriminating product of compulsion, was neither petitioner's testimony nor evidence relating to some communicative act or writing by petitioner, it was not inadmissible on privilege grounds." 384 U.S., at 765, 86 S.Ct., at 1833, 16 L.Ed.2d, at 916.

218, 222–223, 87 S.Ct. 1926, 1929–1930, 18 L.Ed.2d 1149, 1154–1155 (1967); or the donning of a blouse worn by the perpetrator, *Holt v. United States*, 218 U.S. 245, 31 S.Ct. 2, 54 L.Ed. 1021 (1910). Furthermore, despite *Boyd*, neither a partnership nor the individual partners are shielded from compelled production of partnership records on self-incrimination grounds. *Bellis v. United States*, 417 U.S. 85, 94 S.Ct. 2179, 40 L.Ed.2d 678 (1974). It would appear that under that case the precise claim sustained in *Boyd* would now be rejected for reasons not there considered.

The pronouncement in *Boyd* that a person may not be forced to produce his private papers has nonetheless often appeared as dictum in later opinions of this Court. See *e. g., Wilson v. United States*, 221 U.S. 361, 377, 31 S.Ct. 538, 543, 55 L.Ed. 771, 778 (1911); *Wheeler v. United States*, 226 U.S. 478, 489, 33 S.Ct. 158, 162, 57 L.Ed. 309, 313 (1913); *United States v. White*, 322 U.S. 694, 698–699, 64 S.Ct. 1248, 1251, 88 L.Ed. 1409 1542, 1545–1546 (1944); *Davis v. United States*, 328 U.S., at 587–588, 66 S.Ct., at 1258–1259, 90 L.Ed., at 1456–1457; *Schmerber, supra*, 384 U.S., at 763–764, 86 S.Ct., at 1831–1832, 16 L.Ed.2d, at 915–916; *Couch v. United States*, 409 U.S., at 330, 93 S.Ct., at 616, 34 L.Ed.2d, at 555; *Bellis v. United States, supra*, 417 U.S., at 87, 94 S.Ct., at 2182, 40 L.Ed.2d, at 683. To the extent, however, that the rule against compelling production of private papers rested on the proposition that seizures of or subpoenas for "mere evidence," including documents, violated the Fourth Amendment and therefore also transgressed the Fifth, *Gouled v. United States, supra*, the foundations for the rule have been washed away. In consequence, the prohibition against forcing the production of private papers has long been a rule searching for a rationale consistent with the proscriptions of the Fifth Amendment against compelling a person to give "testimony" that incriminates him. Accordingly, we turn to the question of what, if any, incriminating testimony within the Fifth Amendment's protection, is compelled by a documentary summons.

[13] A subpoena served on a taxpayer requiring him to produce an accountant's workpapers in his possession without doubt involves substantial compulsion. But it does not compel oral testimony; nor would it ordinarily compel the taxpayer to restate, repeat, or affirm the truth of the contents of the documents sought. Therefore, the Fifth Amendment would not be violated by the fact alone that the papers on their face might incriminate the taxpayer, for the privilege protects a person only against being incriminated by his own compelled testimonial communications. *Schmerber v. California, supra*; *United States v. Wade, supra*, and *Gilbert v. California, supra*. The accountant's workpapers are not the taxpayer's. They were not prepared by the taxpayer, and they contain no testimonial declarations by him. Furthermore, as far as this record demonstrates, the preparation of all of the papers sought in these cases was wholly voluntary, and they cannot be said to contain compelled testimonial evi- 410 dence, either of the taxpayers or of anyone else.[11] The taxpayer cannot avoid compliance with the subpoena merely by asserting

11. The fact that the documents may have been written by the person asserting the privilege is insufficient to trigger the privilege, *Wilson v. United States*, 221 U.S. 361, 378, 31 S.Ct. 538, 543, 55 L.Ed. 771, 778 (1911). And, unless the Government has compelled the subpoenaed person to write the document, cf. *Marchetti v. United States*, 390 U.S. 39, 88 S.Ct. 697, 19 L.Ed.2d 889 (1968); *Grosso v. United States*, 390 U.S. 62, 88 S.Ct. 709, 19 L.Ed.2d 906 (1968), the fact that it was written by him is not controlling with respect to the Fifth Amendment issue. Conversations may be seized and introduced in evidence under proper safeguards, *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967); *Osborn v. United States*, 385 U.S. 323, 87 S.Ct. 429, 439, 17 L.Ed.2d 394 (1966); *Berger v. New York*, 388 U.S. 41, 87 S.Ct. 1873, 18 L.Ed.2d 1040 (1967); *United States v. Bennett*, 409 F.2d, at 897 n. 9, if not compelled. In the case of a documentary subpoena the only thing compelled is the act of producing the document and the compelled act is the same as the one performed when a chattel or document not authored by the producer is demanded. McCormick § 128, p. 261.

that the item of evidence which he is required to produce contains incriminating writing, whether his own or that of someone else.

[14] The act of producing evidence in response to a subpoena nevertheless has communicative aspects of its own, wholly aside from the contents of the papers produced. Compliance with the subpoena tacitly concedes the existence of the papers demanded and their possession or control by the taxpayer. It also would indicate the taxpayer's belief that the papers are those described in the subpoena. *Curcio v. United States*, 354 U.S. 118, 125, 77 S.Ct. 1145, 1150, 1 L.Ed.2d 1225, 1231 (1957). The elements of compulsion are clearly present, but the more difficult issues are whether the tacit averments of the taxpayer are both "testimonial" and "incriminating" for purposes of applying the Fifth Amendment. These questions perhaps do not lend themselves to categorical answers; their resolution may instead depend on the facts and circumstances of particular cases or classes thereof. In light of the records now before us, we are confident that however incrimi-
411 nating the contents of the accountant's workpapers might be, the act of producing them—the only thing which the taxpayer is compelled to do—would not itself involve testimonial self-incrimination.

It is doubtful that implicitly admitting the existence and possession of the papers rises to the level of testimony within the protection of the Fifth Amendment. The papers belong to the accountant, were prepared by him, and are the kind usually prepared by an accountant working on the tax returns of his client. Surely the Government is in no way relying on the "truth-telling" of the taxpayer to prove the existence of or his access to the documents. 8 Wigmore § 2264, p. 380. The existence and location of the papers are a foregone conclusion and the taxpayer adds little or nothing to the sum total of the Government's information by conceding that he in fact has the papers. Under these circumstances by enforcement of the summons "no constitutional rights are touched. The question is not of testimony but of surrender." *In re Harris*, 221 U.S. 274, 279, 31 S.Ct. 557, 558, 55 L.Ed. 732, 735 (1911).

When an accused is required to submit a handwriting exemplar he admits his ability to write and impliedly asserts that the exemplar is his writing. But in common experience, the first would be a near truism and the latter self-evident. In any event, although the exemplar may be incriminating to the accused and although he is compelled to furnish it, his Fifth Amendment privilege is not violated because nothing he has said or done is deemed to be sufficiently testimonial for purposes of the privilege. This Court has also time and again allowed subpoenas against the custodian of corporate documents or those belonging to other collective entities such as unions and partnerships and those of bankrupt businesses over claims that the documents will incriminate the custodian despite the fact that producing the documents tacitly admits their existence and their location in the hands of their possessor. *E. g., Wilson v.* 412 *United States*, 221 U.S. 361, 31 S.Ct. 538, 55 L.Ed. 771 (1911); *Dreier v. United States*, 221 U.S. 394, 31 S.Ct. 550, 55 L.Ed. 784 (1911); *United States v. White*, 322 U.S. 694, 64 S.Ct. 1248, 88 L.Ed. 1542 (1944); *Bellis v. United States*, 417 U.S. 85, 94 S.Ct. 2179, 40 L.Ed.2d 678 (1974); *In re Harris*, *supra*. The existence and possession or control of the subpoenaed documents being no more in issue here than in the above cases, the summons is equally enforceable.

Moreover, assuming that these aspects of producing the accountant's papers have some minimal testimonial significance, surely it is not illegal to seek accounting help in connection with one's tax returns or for the accountant to prepare workpapers and deliver them to the taxpayer. At this juncture, we are quite unprepared to hold that either the fact of existence of the papers or of their possession by the taxpayer poses any realistic threat of incrimination to the taxpayer.

As for the possibility that responding to the subpoena would authenticate [12] the]413 workpapers, production would express nothing more than the taxpayer's belief that the papers are those described in the subpoena. The taxpayer would be no more competent to authenticate the accountant's workpapers or reports [13] by producing them than he would be to authenticate them if testifying orally. The taxpayer did not prepare the papers and could not vouch for their accuracy. The documents would not be admissible in evidence against the taxpayer without authenticating testimony. Without more, responding to the subpoena in the circumstances before us would not appear to represent a substantial threat of self-incrimination. Moreover, in *Wilson v. United States, supra*; *Dreier v. United States, supra*; *United States v. White, supra*; *Bellis v. United States, supra*; and *In re Harris, supra*, the custodian of corporate, union, or partnership books or those of a bankrupt business was ordered to respond to a subpoena for the business' books even though doing so involved a "representation that the documents produced are those demanded by the subpoena," *Curcio v. United States*, 354 U.S., at 125, 77 S.Ct., at 1150, 1 L.Ed.2d, at 1231.[14]

]414 [15] Whether the Fifth Amendment would shield the taxpayer from producing his own tax records in his possession is a question not involved here; for the papers demanded here are not his "private papers," see *Boyd v. United States, supra*, 116 U.S., at 634–635, 6 S.Ct., at 534, 29 L.Ed., at 752. We do hold that compliance with a summons directing the taxpayer to produce the accountant's documents involved in these cases would involve no incriminating testimony within the protection of the Fifth Amendment.

The judgment of the Court of Appeals for the Fifth Circuit in No. 74–611 is reversed. The judgment of the Court of Appeals for the Third Circuit in No. 74–18 is affirmed.

So ordered.

Affirmed in part; reversed in part.

Mr. Justice STEVENS took no part in the consideration or disposition of these cases.

12. The "implicit authentication" rationale appears to be the prevailing justification for the Fifth Amendment's application to documentary subpoenas. *Schmerber v. California*, 384 U.S., at 763–764, 86 S.Ct., at 1832, 16 L.Ed.2d, at 915–916 ("the privilege reaches . . . the compulsion of responses which are also communications, for example, compliance with a subpoena to produce one's papers. *Boyd v. United States*, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746"); *Couch v. United States*, 409 U.S., at 344, 346, 93 S.Ct., at 611, 625, 34 L.Ed.2d, at 548, 564 (Marshall, J., dissenting) (the person complying with the subpoena "implicitly testifies that the evidence he brings forth is in fact the evidence demanded"); *United States v. Beattie*, 522 F.2d 267, 270 (CA2 1975) (Friendly, J.) ("[a] subpoena demanding that an accused produce his own records is . . . the equivalent of requiring him to take the stand and admit their genuineness"), cert. pending, Nos. 75–407, 75–700; 8 Wigmore § 2264, p. 380 (the testimonial component involved in compliance with an order for production of documents or chattels "is the witness' assurance, compelled as an incident of the process, that the articles produced are the ones demanded"); McCormick § 126, p. 268 ("[t]his rule [applying the Fifth Amendment privilege to documentary subpoenas] is defended on the theory that one who produces documents (or other matter) described in the subpoena *duces tecum* represents, by his production, that the documents produced are in fact the documents described in the subpoena"); *People v. Defore*, 242 N.Y. 13, 27, 150 N.E. 585, 590 (1926) (Cardozo, J.) ("A defendant is 'protected from producing his documents in response to a *subpoena duces tecum*, for his production of them in court would be his voucher of their genuineness.' There would then be 'testimonial compulsion' ").

13. In seeking the accountant's "retained copies" of correspondence with the taxpayer in No. 74–611, we assume that the summons sought only "copies" of original letters sent from the accountant to the taxpayer—the truth of the contents of which could be testified to only by the accountant.

14. In these cases compliance with the subpoena is required even though the books have been kept by the person subpoenaed and his producing them would itself be sufficient authentication to permit their introduction against him.

Mr. Justice BRENNAN, concurring in the judgment.

I concur in the judgment. Given the prior access by accountants retained by the taxpayers to the papers involved in these cases and the wholly business rather than personal nature of the papers, I agree that the privilege against compelled self-incrimination did not in either of these cases protect the papers from production in response to the summonses. See *Couch v. United States*, 409 U.S. 322, 335–336, 93 S.Ct. 611, 619–620, 34 L.Ed.2d 548, 557–558 (1973); *id.*, at 337, 93 S.Ct., at 620, 34 L.Ed.2d, at 559 (Brennan, J., concurring). I do not join the Court's opinion, however, because of the portent of much of what is said of a serious crippling of the protection secured by the privilege against compelled production of one's private books and papers. Like today's decision in *United States v. Miller*, 425 U.S. 435, 96 S.Ct. 1619, 48 L.Ed.2d 71, it is but another step in the denigration of privacy principles settled nearly 100 years ago in *Boyd v. United States*, 116 U.S. 616, 6]415 S.Ct. 524, 29 L.Ed. 746 1(1886). According to the Court, "[w]hether the Fifth Amendment would shield the taxpayer from producing his own tax records in his possession is a question not involved here; for the papers demanded here are not his 'private papers.'" *Ante*, at 1582. This implication that the privilege might not protect against compelled production of tax records that are his "private papers" is so contrary to settled constitutional jurisprudence that this and other like implications throughout the opinion [1] prompt me to conjecture that once again the Court is laying the groundwork for future decisions that will tell us that the question here formally reserved was actually answered against the availability of the privilege. *Semble, Hudgens v. NLRB*, 424 U.S. 507, 96 S.Ct. 1029, 47 L.Ed.2d 196 (1976). It is therefore appropriate to recall that history and this Court have construed the constitutional privilege to safeguard against governmental intrusions of personal privacy to compel either self-incriminating oral statements or the production of self-incriminating evidence recorded in one's private books and papers. Although as phrased in the Fifth Amendment—"nor shall [any person] be compelled in any criminal case to be a witness against himself"—the privilege makes no express reference, as does the Fourth Amendment, to "papers, and effects," private papers have long been held to have the protection of the privilege, designed as it is "to maintain inviolate large areas of personal privacy." *Feldman v. United States*, 322 U.S. 487, 490, 64 S.Ct. 1082, 1083, 88 L.Ed. 1408, 1412 (1944).

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Expressions are legion in opinions of this Court that the protection of personal privacy is a central purpose of the privilege against compelled self-incrimination. "[I]t is the invasion of [a person's] indefeasible right of personal security, personal liberty and private property" that "constitutes the essence of the offence" that violates the privilege. *Boyd v. United States, supra*, 116 U.S., at 630, 6 S.Ct., at 532, 29 L.Ed., at 751. The privilege reflects "our respect for the inviolability of the human personality and of the right of each individual 'to a private enclave where he may lead a private life.'" *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55, 84 S.Ct. 1594, 1597, 12 L.Ed.2d 678, 681 (1964). "It respects a private inner sanctum of individual feeling and thought and proscribes state intrusion to extract self-condemnation." *Couch v. United States, supra*, 409 U.S., at 327, 93 S.Ct., at 615, 34 L.Ed.2d at 553. See also *Tehan v. United States ex rel. Shott*, 382 U.S. 406, 416, 86 S.Ct. 459, 465, 15 L.Ed.2d 453, 460 (1966); *Miranda v. Arizona*, 384

1. For example, the Court's notation that "[s]pecial problems of privacy which might be presented by subpoena of a diary . . . are not involved here," *ante*, at 1576 n. 7, is only made in the context of discussion of the Fourth Amendment and thus may readily imply that even a subpoena of a personal diary containing forthright confessions of crime may not be resisted on grounds of the privilege.

U.S. 436, 460, 86 S.Ct. 1602, 1620, 16 L.Ed.2d 694, 715 (1966). "The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment." *Griswold v. Connecticut*, 381 U.S. 479, 484, 85 S.Ct. 1678, 1681, 14 L.Ed.2d 510, 515 (1965). See also *Katz v. United States*, 389 U.S. 347, 350 n.5, 88 S.Ct. 507, 510, 19 L.Ed.2d 576, 581 (1967).

The Court pays lip service to this bedrock premise of privacy in the statement that "[w]ithin the limits imposed by the language of the Fifth Amendment, which we necessarily observe, the privilege truly serves privacy interests," *ante*, at 1575. But this only makes explicit what elsewhere highlights the opinion, namely, the view that protection of personal privacy is merely a by product and not, as our precedents and history teach, a factor controlling in part the determination of the scope of the privilege. This cart-before-the-horse approach is fundamentally at odds with the settled principle that the scope of the privilege is not constrained by the limits of the
417 wording of the Fifth Amendment but has the reach necessary to protect the cherished value of privacy which it safeguards. See *Schmerber v. California*, 384 U.S. 757, 761–762, 86 S.Ct. 1826, 1831, 16 L.Ed.2d 908, 914 n. 6 (1966). The "Court has always construed provisions of the Constitution having regard to the principles upon which it was established. The direct operation or literal meaning of the words used do not measure the purpose or scope of its provisions. . . ." *United States v. Lefkowitz*, 285 U.S. 452, 467, 52 S.Ct. 420, 424, 76 L.Ed. 877, 883 (1932). "It has been repeatedly decided that [the Fifth Amendment] should receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by [it], by imperceptible practice of courts or by well-intentioned, but mistakenly overzealous executive officers." *Gouled v. United States*, 255 U.S. 298, 304, 41 S.Ct. 261, 263, 65 L.Ed. 647, 650 (1921). See *Maness v. Meyers*, 419 U.S. 449, 461, 95 S.Ct. 584, 592, 42 L.Ed.2d 574, 584 (1975). History and principle, not the mechanical application of its wording, have been the life of the Amendment.[2]

That the privilege does not protect against the production of private information where there is no compulsion, or where immunity is granted, or where there is no threat of incrimination in nowise supports the Court's argument demeaning the privilege's protection of privacy. The unavailability of the privilege in those cases only evidences that, as is the case with the First and Fourth Amendments, the protection of privacy afforded by the privilege is not absolute. The critical question then is the definition of the scope of privacy that is sheltered by the privilege.

History and principle teach that the privacy 418 protected by the Fifth Amendment extends not just to the individual's immediate declarations, oral or written, but also to his testimonial materials in the form of books and papers.[3] "The right was originally a 'right of silence' . . . only in the sense that legal process could not force incriminating statements from the defend-

2. "The privilege against self-incrimination is a specific provision of which it is peculiarly true that 'a page of history is worth a volume of logic.'" *Ullmann v. United States*, 350 U.S. 422, 438, 76 S.Ct. 497, 506, 100 L.Ed. 511, 524 (1956) (Frankfurter, J.). "The previous history of the right, both in England and America, proves that it was not bound by rigid definition." L. Levy, Origins of the Fifth Amendment 428 (1968).

3. Indeed, *Schmerber v. California*, 384 U.S. 757, 764, 86 S.Ct. 1826, 1832, 16 L.Ed.2d 908, 916 (1966), held:

"Some tests seemingly directed to obtain 'physical evidence,' for example, lie detector tests measuring changes in body function during interrogation, may actually be directed to eliciting responses which are essentially testimonial. To compel a person to submit to testing in which an effort will be made to determine his guilt or innocence on the basis of physiological responses, whether willed or not, is to evoke the spirit and history of the Fifth Amendment. Such situations call to mind the principle that the protection of the privilege 'is as broad as the mischief against which it seeks to guard.' . . ."

ant's own lips. Beginning in the early eighteenth century the English courts widened that right to include protection against the necessity of producing books and documents that might tend to incriminate the accused. . . . Lord Mansfield summed up the law by declaring that the defendant, in a criminal case, could not be compelled to produce any incriminating documentary evidence 'though he should hold it in his hands in Court.'" L. Levy, Origins of the Fifth Amendment 390 (1968).[4] Thus, in recognizing the privilege's protection of private books and papers, *Boyd v. United States*, 116 U.S., at 633, 634–635, 6 S.Ct., at 533, 534–535, 29 L.Ed., at 752, 753, was faithful to this historical conception of the privilege. *Boyd* was reaffirmed in this respect in *Ballmann v. Fagin*, 200 U.S. 186, 26 S.Ct. 212, 50 L.Ed. 433 (1906), which held that an individual could not be compelled to produce a personal cashbook containing incriminating evidence. *Schmerber v. California*, 384 U.S., at 761, 86 S.Ct., at 1830, 16 L.Ed.2d, at 914, most recently expressly held "that the privilege protects an accused . . . from being compelled to testify against himself, or *otherwise provide the State with evidence of a testimonial or communicative nature* . . .." (Emphasis supplied.) Indeed, *Boyd's* holding has often been reiterated without question. *E.g., Bellis v. United States*, 417 U.S. 85, 87, 94 S.Ct. 2179, 2182, 40 L.Ed.2d 678, 683 (1974); *United States v. Calandra*, 414 U.S. 338, 346, 94 S.Ct. 613, 619, 38 L.Ed.2d 561, 570 (1974); *Couch v. United States*, 409 U.S. 322, 93 S.Ct. 611, 34 L.Ed.2d 548 (1973); *United States v. Wade*, 388 U.S. 218, 221, 87 S.Ct. 1926, 1929, 18 L.Ed.2d 1149, 1154 (1967); *Gilbert v. California*, 388 U.S. 263, 266, 87 S.Ct. 1951, 1953, 18 L.Ed.2d 1178, 1182 (1967); *Davis v. United States*, 328 U.S. 582, 587–588, 66 S.Ct. 1256, 1257–1259, 90 L.Ed. 1453, 1456–1457 (1946); *United States v. White*, 322 U.S. 694, 698–699, 64 S.Ct. 1248, 1251, 88 L.Ed. 1542, 1545, 1546 (1944); *Wheeler v. United States*, 226 U.S. 478, 489, 33 S.Ct. 158, 162, 57 L.Ed. 309, 313 (1913); *Wilson v. United States*, 221 U.S. 361, 375, 31 S.Ct. 538, 542, 55 L.Ed. 771 (1911); *ICC v. Baird*, 194 U.S. 25, 45, 24 S.Ct. 563, 569, 48 L.Ed. 860, 869 (1904). It may therefore be emphatically stated that until today, there was no room to doubt that it is the Fifth Amendment's "historic function [to protect an individual] from compulsory incrimination through his own testimony or *personal records*." *United States v. White, supra*, 322 U.S., at 701, 64 S.Ct., at 1252, 88 L.Ed., at 1547 (emphasis supplied).

The common-law and constitutional extension of the privilege to testimonial materials, such as books and papers, was inevitable. An individual's books and papers are generally little more than an extension of his person. They reveal no less than he could reveal upon being questioned directly. Many of the matters within an individual's knowledge may as easily be retained within his head as set down on a scrap of paper. I perceive no principle which does not permit compelling one to disclose the contents of one's mind but does permit compelling the disclosure of the contents of that scrap of paper by compelling its production. Under a contrary view, the constitutional protec-

4. "The language of the Constitution cannot be interpreted safely except by reference to the common law and to British institutions as they were when the instrument was framed and adopted." *Ex parte Grossman*, 267 U.S. 87, 108–109, 45 S.Ct. 332, 333, 69 L.Ed. 527, 530 (1925). But, "the common law rule invoked shall be one not rejected by our ancestors as unsuited to their civil or political conditions." *Grosjean v. American Press Co.*, 297 U.S. 233, 249, 56 S.Ct. 444, 449, 80 L.Ed. 660, 668 (1936). Without a doubt, the common-law privilege against self-incrimination in England extended to protection against the production of incriminating personal papers prior to the adoption of the United States Constitution. See, *e.g., Roe v. Harvey*, 98 Eng.Rep. 302, 305 (K.B.1769); *King v. Heydon*, 96 Eng.Rep. 195 (K.B.1762); *King v. Purnell*, 95 Eng.Rep. 595, 597 (K.B. 1748); *King v. Cornelius*, 93 Eng.Rep. 1133, 1134 (K.B.1744); *Queen v. Mead*, 92 Eng.Rep. 119 (K.B.1703); *King v. Worsenham*, 91 Eng. Rep. 1370 (K.B.1701). The significance of this English development on the construction of our Constitution is not in any way diminished by this country's experience with the privilege prior to the Constitution's adoption. See Levy, *supra*, n. 2, at 368–404.

tion would turn on fortuity, and persons would, at their peril, record their thoughts and the events of their lives. The ability to think private thoughts, facilitated as it is by pen and paper, and the ability to preserve intimate memories would be curtailed through fear that those thoughts or events of those memories would become the subjects of criminal sanctions however invalidly imposed. Indeed, it was the very reality of those fears that helped provide the historical impetus for the privilege. See *Boyd v. United States, supra*, 116 U.S., at 631–632, 6 S.Ct., at 532–533, 29 L.Ed., at 751–752; E. Griswold, The Fifth Amendment Today 8–9 (1955); 8 J. Wigmore, Evidence § 2250, pp. 277–281 (McNaughton rev. 1961); *id.*, § 2251, pp. 313–314; McKay, Self-Incrimination and the New Privacy, 1967 Supreme Court Review 193, 212.[5]

5. "And any compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, to convict him of crime, or to forfeit his property, is contrary to the principles of a free government. It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purposes of despotic power; but it cannot abide the pure atmosphere of political liberty and personal freedom." *Boyd v. United States*, 116 U.S., at 631–632, 6 S.Ct., at 533, 29 L.Ed., at 751.

The proposition, *ante*, at 1580, that *Boyd's* holding ultimately rested on the Fourth Amendment could not be more incorrect. *Boyd* did observe that the purposes to be served by the Fourth and Fifth Amendments shed light on each other, 116 U.S., at 633, 6 S.Ct., at 534, 29 L.Ed., at 752, but the holdings that the compelled production of the papers involved there violated the Fourth and Fifth Amendments were independent of each other. In holding that "a compulsory production of the private books and papers of the owner of goods sought to be forfeited in such a suit is compelling him to be a witness against himself, within the meaning of the Fifth Amendment to the Constitution, and is the equivalent of a search and seizure—and an unreasonable search and seizure—within the meaning of the Fourth Amendment," *id.*, at 634–635, 6 S.Ct., at 534, 29 L.Ed., at 752, the Court plainly did not make the Fourth Amendment violation a predicate, let alone an essential predicate, for its holding that there was also a Fifth Amendment violation. The Court is incorrect in suggesting that "the rule against compelling production of private papers rested on the proposition that seizures of or subpoenas for 'mere evidence,' including documents, violated the Fourth Amendment and therefore also transgressed the Fifth." *Ante*, at 1580. The relation of the Fourth Amendment to the Fifth Amendment violation in *United States v. Lefkowitz*, 285 U.S. 452, 52 S.Ct. 420, 76 L.Ed. 877 (1932); *Agnello v. United States*, 269 U.S. 20, 46 S.Ct. 4, 70 L.Ed. 145 (1925); and *Gouled v. United States*, 255 U.S. 298, 41 S.Ct. 261, 65 L.Ed. 647 (1921), was merely that the illegal searches and seizures in those cases were held to establish the element of compulsion essential to a Fifth Amendment violation. See *ante*, at 1575 n. 5 Even if the Fourth Amendment violations were now held not to establish the element of Fifth Amendment compulsion, it, of course, would not follow that the Fifth Amendment's protection against compelled production of incriminating private papers is lost.

Furthermore, that purely evidentiary material may have been seized in those cases was neither relied upon to establish the Fourth Amendment violations nor, in turn, to establish the Fifth Amendment violations. Indeed, in *Agnello*, contraband, not mere evidence, was illegally seized. Subsequent decisions modifying the "mere evidence" rule, therefore, have left untouched the Fifth Amendment's prohibition against the compelled production of incriminating testimonial evidence. Indeed, citing *Warden v. Hayden*, 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967), the Court notes, that the question is open whether the *legal* search and seizure of some forms of testimonial evidence would violate the Fifth Amendment, *ante*, at 1579 n. 9. *Warden v. Hayden* observed: "The items of clothing involved in this case are not 'testimonial' or 'communicative' in nature, and their introduction therefore did not compel respondent to become a witness against himself in violation of the Fifth Amendment. . . . This case thus does not require that we consider whether there are items of evidential value whose very nature precludes them from being the object of a reasonable search and seizure." 387 U.S., at 302–303, 87 S.Ct., at 1648, 18 L.Ed.2d, at 789. That observation was plainly addressed not to application of the Fourth Amendment but to application of the Fifth.

Contrary to the Court's intimations, *ante*, at 1579, neither *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 583 (1967); *Osborn v. United States*, 385 U.S. 323, 87 S.Ct. 429, 17 L.Ed.2d 394 (1966); nor *Berger v. New York*, 388 U.S. 41, 87 S.Ct. 1873, 18 L.Ed.2d 1040 (1967), all involving the Fourth Amendment, lends support to an argument that the Fifth Amendment would not protect the seizure of the private papers of a person suspected of crime. Fifth Amendment challenges to the seizure and use of private papers were not involved in those cases.

[421] The Court's treatment of the privilege falls far short of giving it the scope required by history and our precedents.[6] It is, of course, true "that the Fifth Amend-[422] ment protects against 'compelled self-incrimination, not [the disclosure of] private information,'" *ante*, at 1576, but it is also true that governmental compulsion to produce private information that might incriminate violates the protection of the privilege. Similarly, although it is necessary that the papers "contain no testimonial declarations by [the taxpayer]" in order for the privilege not to operate as a bar to produc-[423] tion, *ante*, at 1575, it does not follow that papers are not "testimonial" and thus producible because they contain no declarations. And while it may be that the unavailability of the privilege depends on a showing that "the preparation of all of the papers sought in these cases was wholly voluntary," *ibid.*, again it does not follow that the protection is necessarily unavailable if the papers were prepared voluntarily, for it is the compelled *production* of testimonial evidence, not just the compelled creation of such evidence, against which the privilege protects.

Though recognizing that a subpoena served on a taxpayer involves substantial compulsion, the Court concludes that since the subpoena does not compel oral testimony or require the taxpayer to restate, repeat, or affirm the truth of the contents of the documents sought, compelled production of the documents by the taxpayer would not violate the privilege, even though the documents might incriminate the taxpayer. *Ante*, at 1580. This analysis is patently incomplete: the threshold inquiry is whether the taxpayer is compelled to produce incriminating papers. That inquiry is not answered in favor of production merely because the subpoena requires neither oral testimony from nor affirmation of the papers' contents by the taxpayer. To be sure, the Court correctly observes that "[t]he taxpayer cannot avoid compliance with the subpoena *merely* by asserting that the item of evidence which he is required to produce contains incriminating writing, whether his own or that of someone else." *Ante*, at 1580 (emphasis supplied). For it is not enough that the production of a writing, or books and papers, is compelled. Unless those materials are such as to come within the zone of privacy recognized by the Amendment, the privilege against compulsory self-incrimination does not protect against their production.

[424] We are not without guideposts for determining what books, papers, and writings come within the zone of privacy recognized by the Amendment. In *Wilson v. United States*, 221 U.S. 361, 31 S.Ct. 538, 58 L.Ed. 771 (1911), for example, the Court held that the Fifth Amendment did not protect against subpoenaing corporate records in the possession and control of the president of a corporation, even though the records might have incriminated him. Though the evidence was testimonial, though its production was compelled, and though it would have incriminated the party producing it, the Fifth Amendment was no bar. The Court recognized that the Amendment "[u]ndoubtedly . . . protected [the president] against the compulsory production of his private books and papers," *id.*, at 377, 31 S.Ct., at 543, 55 L.Ed., at 778 but with respect to corporate records, the Court held:

> "[T]hey are of a character which subjects them to the scrutiny demanded . . . This was clearly implied in the *Boyd Case*, where the fact that the papers involved were the *private* papers of the claimant was constantly emphasized. Thus, in the case of public records and official documents, made or kept in the

6. The grudging scope the Court today gives the privilege against self-incrimination is made evident by its observation that "[i]n the case of a documentary subpoena the only thing compelled is the act of producing the document . . . ." *Ante*, at 1580 n. 11. Obviously disclosure or production of testimonial evidence is also compelled, and the heart of the protection of the privilege is in its safeguarding against compelled disclosure or production of that evidence.

administration of public office, the fact of actual possession or of lawful custody would not justify the officer in resisting inspection, even though the record was made by himself and would supply the evidence of his criminal dereliction." *Id.*, at 380, 31 S.Ct., at 544, 55 L.Ed., at 779 (emphasis in original).

Couch v. United States, expressly held that the Fifth Amendment protected against the compelled production of testimonial evidence only if the individual resisting production had a reasonable expectation of privacy with respect to the evidence. 409 U.S., at 336, 93 S.Ct., at 619, 34 L.Ed.2d, at 558. *Couch* relied on *Perlman* 1425 *v. United States,* 247 U.S. 7, 38 S.Ct. 417, 62 L.Ed. 950 (1918), where the Court permitted the use against the defendant of documentary evidence belonging to him because "there was a voluntary exposition of the articles" rather than "an invasion of the defendant's privacy." *Id.*, at 14, 38 S.Ct., at 420, 62 L.Ed., at 955. Under *Couch,* therefore, one criterion is whether or not the information sought to be produced has been disclosed to or was within the knowledge of a third party. 409 U.S., at 332–333, 93 S.Ct., at 617–618, 34 L.Ed.2d, at 556–557. That is to say, one relevant consideration is the degree to which the paper holder has sought to keep private the contents of the papers he desires not to produce.

Most recently, *Bellis v. United States,* 417 U.S. 85, 94 S.Ct. 2179, 40 L.Ed.2d 678 (1974), followed the approach taken in *Wilson. Bellis* held that the partner of a small law firm could not invoke the privilege against self-incrimination to justify his refusal to comply with a subpoena requiring production of the partnership's financial records. *Bellis* stated: "It has long been established . . . that the Fifth Amendment privilege against compulsory self-incrimination protects an individual from compelled production of his personal papers and effects as well as compelled oral testimony. . . . The privilege applies to the business records of the sole proprietor or sole practitioner as well as to personal documents containing more intimate information about the individual's private life." 417 U.S., at 87–88, 94 S.Ct., at 2182, 40 L.Ed.2d, at 683. *Bellis* also recognized that the Court's "decisions holding the privilege inapplicable to the records of a collective entity also reflect . . . the protection of an individual's right to a '"private enclave where he may lead a private life."' . . . Protection of individual privacy was the major theme running through the Court's decision in *Boyd* . . . and it was on this basis that the Court in *Wilson* distinguished the corporate records involved in that case from the private papers at issue in *Boyd.*" *Id.*, at 92–92, 94 S.Ct., at 2184, 40 L.Ed.2d, at 685. "[C]orporate records do not contain the req- 1426 uisite element of privacy or confidentiality essential for the privilege to attach." *Id.*, at 92, 94 S.Ct., at 2185, 40 L.Ed.2d, at 686. *Bellis* concluded that the same considerations which precluded reliance upon the privilege with respect to corporate records also precluded reliance upon it with respect to partnership records in the circumstances of that case.[7]

A precise cataloguing of private papers within the ambit of the privacy protected by the privilege is probably impossible. Some papers, however, do lend themselves to classification. See generally Comment, The Search and Seizure of Private Papers: Fourth and Fifth Amendment Considerations, 6 Loyola (LA) L.Rev. 274, 300–303 (1973). Production of documentary materials created or authenticated by a State or the Federal Government, such as automobile registrations or property deeds, would seem ordinarily to fall outside the protection of the privilege. They hardly reflect an extension of the person.

7. With respect to a partnership invoice, it thus seems fair to say, as the Court does, *ante,* at 1579, "that under [*Bellis*] the precise claim sustained in *Boyd* would now be rejected for reasons not there considered." *Bellis,* however, took care to point out: "We do not believe the Court in *Boyd* can be said to have decided the issue presented today," 417 U.S., at 95 n. 2, 94 S.Ct., at 2187, 40 L.Ed.2d, at 688, thereby leaving unaltered *Boyd's* more general or "imprecise" holding protecting against the compelled production of private papers.

Economic and business records may present difficulty in particular cases. The records of business entities generally fall without the scope of the privilege. But, as noted, the Court has recognized that the privilege extends to the business records of the sole proprietor or practitioner. Such records are at least an extension of an aspect of a person's activities, though [427] concededly not the more intimate aspects of one's life. Where the privilege would have protected one's mental notes of his business affairs in a less complicated day and age, it would seem that that protection should not fall away because the complexities of another time compel one to keep business records. Cf. *Olmstead v. United States,* 277 U.S. 438, 474, 48 S.Ct. 564, 571, 72 L.Ed. 944, 954 (1928) (Brandeis, J., dissenting). Nonbusiness economic records in the possession of an individual, such as canceled checks or tax records, would also seem to be protected. They may provide clear insights into a person's total lifestyle. They are, however, like business records and the papers involved in these cases, frequently, though not always, disclosed to other parties; and disclosure, in proper cases, may foreclose reliance upon the privilege. Personal letters constitute an integral aspect of a person's private enclave. And while letters, being necessarily interpersonal, are not wholly private, their peculiarly private nature and the generally narrow extent of their disclosure would seem to render them within the scope of the privilege. Papers in the nature of a personal diary are *a fortiori* protected under the privilege.

The Court's treatment in the instant cases of the question whether the evidence involved here is within the protection of the privilege is, with all respect, most inadequate. The gaping hole is in the omission of any reference to the taxpayer's privacy interests and to whether the subpoenas impermissibly invade those interests. The observations that the "accountant's workpapers are not the taxpayer's" and "were not prepared by the taxpayer," *ante,* at 1580, touch on matters relevant to the taxpayer's expectation of privacy, but do not of themselves determine the availability of the privilege. *Wilson v. United States,* 221 U.S., at 378, 31 S.Ct., at 543, 55 L.Ed., at 778, stated: "[T]he mere fact that [428] the appellant himself wrote, or signed, the [documents], neither conditioned nor enlarged his privilege. Where one's private documents would tend to incriminate him, the privilege exists although they were actually written by another person." [8] Thus, although "[t]he fact that the documents may have been written by the person asserting the privilege is insufficient to trigger the privilege," *ante,* at 1580 n. 11, and "the fact that it was written by him is not controlling . . .," *ibid.,* this is not to say that the privilege is available only as to documents written by him. For the reasons I have stated at the outset, however, I do not believe that the evidence involved in these cases falls within the scope of privacy protected by the Fifth Amendment.

II

I also question the Court's treatment of the question whether the act of producing evidence is "testimonial." I agree that the act of production implicitly admits the existence of the evidence requested and possession or control of that evidence by the party producing it. It also implicitly authenticates the evidence as that identified in the order to compel. I disagree, however, that implicit admission of the existence and possession or control of the papers in this case is not "testimonial" merely because the Government could readily have otherwise proved existence and possession or control in these cases. [429] I know of no Fifth Amendment principle which makes

8. Similarly, *United States v. Nobles,* 422 U.S. 225, 95 S.Ct. 2160, 45 L.Ed.2d 141 (1975), held that the Fifth Amendment did not bar production of a defense investigator's summaries of interviews with witnesses. The Court carefully noted, however, that there was no indication that the summaries contained any information conveyed by the defendant to the investigator. *Id.,* at 234, 95 S.Ct., at 2168, 45 L.Ed.2d, at 151.

the testimonial nature of evidence, and therefore, one's protection against incriminating himself, turn on the strength of the Government's case against him.

Nor do I consider the taxpayers' implicit authentication an insubstantial threat of self-incrimination. Actually, authentication of the papers as those described in the subpoenas establishes the papers as the taxpayers', thereby supplying an incriminatory link in the chain of evidence against them. It is not the less so because the taxpayers' accountants may also provide the link, since the protection against self-incrimination cannot, I repeat, turn on the strength of the Government's case.

This Court's treatment of handwriting exemplars is not supportive of its position. See *Gilbert v. California,* 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967). The Court has only recognized that "[a] mere handwriting exemplar . . ., like the voice or body itself, is an identifying physical characteristic outside its protection." *Id.,* 388 U.S., at 266–267, 87 S.Ct., at 1953, 18 L.Ed.2d, at 1183. It is because handwriting exemplars are viewed as strictly nontestimonial, not because they are insufficiently testimonial, that the Fifth Amendment does not protect against their compelled production. Also not supportive of the Court's position is the principle that the custodian of documents of a collective entity is not protected from the act of producing those documents. Nothing in the language of those cases, either expressly or impliedly, indicates that the act of production with respect to the records of business entities is insufficiently testimonial for purposes of the Fifth Amendment. At most, those issues, though considered, were disposed of on the ground, not that production was insufficiently testimonial, but that one in control of the records of an artificial organization undertakes an obligation with re- 430
spect to those records foreclosing any exercise of his privilege.[9]

Mr. Justice MARSHALL, concurring in the judgment.

Today the Court adopts a wholly new approach for deciding when the Fifth Amendment privilege against self-incrimination can be asserted to bar production of documentary evidence.[1] This approach has, in various forms, been discussed by com- 431
mentators for some time; nonetheless as I noted a few years ago, the theory "has an odd sound to it." *Couch v. United States,* 409 U.S. 322, 348, 93 S.Ct. 611, 625, 34 L.Ed.2d 548, 565 (1973) (dissenting). The Fifth Amendment basis for resisting pro-

9. Individuals acting as representatives of a collective group "assume the rights, duties and privileges of the artificial entity or association of which they are agents or officers, and they are bound by its obligations." *United States v. White,* 322 U.S. 694, 699, 64 S.Ct. 1248, 1251, 88 L.Ed. 1542, 1546 (1944). "In view of the inescapable fact that an artificial entity can only act or produce its records through its individual officers or agents, recognition of the individual's claim of privilege with respect to the financial records of the organization would substantially undermine the unchallenged rule that the organization itself is not entitled to claim any Fifth Amendment privilege, and largely frustrate legitimate governmental regulation of such organizations." *Bellis v. United States,* 417 U.S., at 90, 94 S.Ct., at 2184, 40 L.Ed.2d, at 685. Indeed, in one of the more recent corporate records cases, *Curcio v. United States,* 354 U.S. 118, 125, 77 S.Ct. 1145, 1150, 1 L.Ed.2d 1225, 1231 (1957), the Court expressly recognized that "[t]he custodian's act of producing books or records in response to a subpoena *duces tecum* is itself a representation that the documents produced are those demanded by the subpoena." The Court in *Curcio,* however, apparently did not note any self-incrimination problem because of the undertaking by the custodian with respect to the documents. (One charged with failure to comply with an order to produce, however, may not thereafter be compelled to testify as to the existence or his control of the documents. See *Curcio v. United States, supra.*) In the present cases, of course, the taxpayers are not representatives of any artificial entity and have not undertaken any obligation with respect to that entity or its documents. They have stipulated, however, that the documents involved here exist and are those described in the subpoenas, thereby obviating any problem as to self-incrimination in these cases resulting from the act of production itself.

1. The Court's theory would appear to apply to real evidence as well.

duction of a document pursuant to subpoena, the Court tells us today, lies not in the document's contents, as we previously have suggested, but in the tacit verification inherent in the act of production itself that the document exists, is in the possession of the producer, and is the one sought by the subpoena.

This technical and somewhat esoteric focus on the testimonial elements of production rather than on the content of the evidence the investigator seeks is, as Mr. Justice BRENNAN demonstrates, contrary to the history and traditions of the privilege against self-incrimination both in this country and in England, where the privilege originated. A long line of precedents in this Court, whose rationales if not holdings are overturned by the Court today, support the notion that "any forcible and compulsory extortion of a man's . . . private papers to be used as evidence to convict him of crime" compels him to be a witness against himself within the meaning of the Fifth Amendment to the Constitution. *Boyd v. United States*, 116 U.S. 616, 630, 6 S.Ct. 524, 532, 29 L.Ed. 746, 751 (1886). See also *Bellis v. United States*, 417 U.S. 85, 87, 94 S.Ct. 2179, 2182, 40 L.Ed.2d 678, 683 (1974); *Couch v. United States, supra*, 409 U.S., at 330, 93 S.Ct., at 616, 34 L.Ed.2d, at 555; *Schmerber v. California*, 384 U.S. 757, 763–764, 86 S.Ct. 1826, 1831–1832, 16 L.Ed.2d 908, 915–916 (1966); *Davis v. United States*, 328 U.S. 582, 587–588, 66 S.Ct. 1256, 1258–1259, 90 L.Ed. 1453, 1456–1457 (1946); *United States v. White*, 322 U.S. 694, 698–699, 64 S.Ct. 1248, 1251, 88 L.Ed. 1542, 1545–1546 (1944); *Wheeler v. United States*, 226 U.S. 478, 489, 33 S.Ct. 158, 162, 57 L.Ed. 309, 313 (1913); *Wilson v. United States*, 221 U.S. 361, 377, 31 S.Ct. 538, 543, 55 L.Ed. 771, 778 (1911).

However analytically imprecise these cases may be, they represent a deeply held belief on the part of the Members of this
1432 Court throughout its history that there are certain documents no person ought to be compelled to produce at the Government's request. While I welcome the Court's attempt to provide a rationale for this long-standing rule, it is incumbent upon the Court, I believe, to fashion its theory so as to protect those documents that have always stood at the core of the Court's concern. Thus, I would have preferred it had the Court found some room in its theory for recognition of the import of the contents of the documents themselves. See *Couch v. United States, supra*, 409 U.S., at 350, 93 S.Ct., at 626, 34 L.Ed.2d, at 566 (Marshall, J., dissenting).

Nonetheless, I am hopeful that the Court's new theory, properly understood and applied, will provide substantially the same protection as our prior focus on the contents of the documents. The Court recognizes, as others have argued, that the act of production can verify the authenticity of the documents produced. See, *e. g.*, *United States v. Beattie*, 522 F.2d 267 (CA2 1975), cert. pending, Nos. 75–407, 75–700. But the promise of the Court's theory lies in its innovative discernment that production may also verify the documents' very existence and present possession by the producer. This expanded recognition of the kinds of testimony inherent in production not only rationalizes the cases, but seems to me to afford almost complete protection against compulsory production of our most private papers.

Thus, the Court's rationale provides a persuasive basis for distinguishing between the corporate-document cases and those involving the papers of private citizens. Since the existence of corporate record books is seldom in doubt, the verification of their existence, inherent in their production, may fairly be termed not testimonial at all. On the other hand, there is little reason to assume the present existence and possession of most private papers, and certainly not those Mr. Justice BRENNAN places at the top of his list of documents that the privilege should protect. See *ante*, at 1588–1589 (concurring in judgment). Indeed, there 1433
would appear to be a precise inverse relationship between the private nature of the document and the permissibility of assum-

ing its existence. Therefore, under the Court's theory, the admission through production that one's diary, letters, prior tax returns, personally maintained financial records, or canceled checks exist would ordinarily provide substantial testimony. The incriminating nature of such an admission is clear, for while it may not be criminal to keep a diary, or write letters or checks, the admission that one does and that those documents are still available may quickly—or simultaneously—lead to incriminating evidence. If there is a "real danger" of such a result, that is enough under our cases to make such testimony subject to the claim of privilege. See *Rogers v. United States*, 340 U.S. 367, 71 S.Ct. 438, 95 L.Ed. 344 (1951); *Brown v. Walker*, 161 U.S. 591, 16 S.Ct. 644, 40 L.Ed. 819 (1896); *Counselman v. Hitchcock*, 142 U.S. 547, 12 S.Ct. 195, 35 L.Ed. 1110 (1892). Thus, in practice, the Court's approach should still focus upon the private nature of the papers subpoenaed and protect those about which *Boyd* and its progeny were most concerned.

The Court's theory will also limit the prosecution's ability to use documents secured through a grant of immunity. If authentication that the document produced is the document demanded were the only testimony inherent in production, immunity would be a useful tool for obtaining written evidence. So long as a document obtained under an immunity grant could be authenticated through other sources, as would often be possible, reliance on the immunized testimony—the authentication—and its fruits would not be necessary, and the document could be introduced. The Court's recognition that the act of production also involves testimony about the existence and possession of the subpoenaed documents mandates a different result. Under the Court's theory, if the document is to be obtained the
434 immunity grant must extend to the testimony that the document is presently in existence. Such a grant will effectively shield the contents of the document, for the contents are a direct fruit of the immunized testimony—that the document exists—and cannot usually be obtained without reliance on that testimony.[2] Accordingly, the Court's theory offers substantially the same protection against procurement of documents under grant of immunity that our prior cases afford.

In short, while the Court sacrifices our pragmatic, if somewhat *ad hoc*, content analysis for what might seem an unduly technical focus on the act of production itself, I am far less pessimistic than Mr. Justice BRENNAN that this new approach signals the end of Fifth Amendment protection for documents we have long held to be privileged. I am not ready to embrace the approach myself, but I am confident in the ability of the trial judges who must apply this difficult test in the first instance to act with sensitivity to our traditional concerns in this uncertain area.

For the reasons stated by Mr. Justice BRENNAN, I concur in the judgment of the Court.

425 U.S. 352, 48 L.Ed.2d 11

DEPARTMENT OF the AIR FORCE et al., Petitioners,

v.

Michael T. ROSE et al.

No. 74–489.

Argued Oct. 8, 1975.

Decided April 21, 1976.

Present and former law review editors brought action under Freedom of Information Act to compel disclosure of case summaries of honor and ethics hearings at ser-

2. Similarly, the Court's theory affords protection to one who possesses documents that he cannot authenticate. If authentication were the only relevant testimony inherent in the act of production, such a person would be forced to relinquish his documents, for he provides no authentication testimony of relevance by producing them in response to a subpoena. See *United States v. Beattie*, 522 F.2d 267 (CA2 1975) cert. pending, Nos. 75–407, 75–700. Under the Court's theory, however, if the existence of these documents were in question, the custodian would still be able to assert a claim of privilege against their production.

HARVARD
LAW REVIEW

VOL. XXVIII FEBRUARY, 1915 NO. 4

INTERESTS OF PERSONALITY

I. INTERESTS [1]

A LEGAL system attains its end by recognizing certain interests, — individual, public, and social, — by defining the limits within which these interests shall be recognized legally and given effect through the force of the state, and by endeavoring to secure the interests so recognized within the defined limits. It does not create these interests. There is so much truth in the old theories of natural rights. Undoubtedly the progress of society and the development of government increase the demands which individuals may make, and so increase the number and variety of these interests.[2] But they arise, apart from the law, through

NOTE. The substance of this paper will appear in Chapter IX of a book entitled "Sociological Jurisprudence," now in preparation.

[1] Ritchie, Natural Rights; Spencer, Justice, chs. 9–18; Paulsen, Ethics (Thilly's trans.), 633–637; Green, Principles of Political Obligation, §§ 30–31; Lorimer, Institutes of Law, ch. 7; Demogue, Notions fondamentales du droit privé, 405–443; Ahrens, Cours de droit naturel, 8 ed., II, §§ 43–88; Hegel, Grundlinien der Philosophie des Rechts, §§ 34–104; Fichte, Grundlage des Naturrechts, §§ 18, 19, Erster Anhang, §§ 1–61 (Kroeger's trans., 298–343, 391–469); Beaussire, Les principes du droit, bk. III; Lasson, System der Rechtsphilosophie, §§ 48–56; Boistel, Philosophie du droit, I, §§ 96–241; Kohler, Lehrbuch der Rechtsphilosophie, 91–142; Miraglia, Comparative Legal Philosophy (Lisle's Trans.), bk. II, chs. 1, 2.

[2] "A man's rights multiply as his opportunities and capacities develop. . . . The more civilized the nation, the richer he is in rights." Miraglia, Comparative Legal Philosophy (Lisle's trans.), 324. The idea here is that interests, — that is, demands of the individual, — increase with increasing civilization, and hence the

the competition of individuals with each other, the competition of groups or societies with each other, and the competition of individuals with such groups or societies. The law does not create them, it only recognizes them. Yet it does not have for its sole function to recognize interests which exist independently. It must determine which it will recognize, it must define the extent to which it will give effect to them in view of other interests, — individual, public, or social, — and the possibilities of effective interference by law, and it must devise the means by which they are to be secured. Hence in determining the scope and subject-matter of a legal system we have to consider (1) the interests which it may be asserted the law ought to recognize and to secure; (2) the principles upon which interests are to be selected for such recognition and securing; (3) the principles upon which such interests should be defined and limited for the purposes of legal recognition, or, in other words, the principles upon which conflicting interests should be weighed or balanced in order to determine the extent to which the respective interests are to be given effect; (4) the means by which the law may secure the interests which it recognizes; and (5) the limitations upon effective legal action which preclude complete recognition or complete securing of all these interests to the full extent which ethical considerations might require.

Strictly the concern of the law is with social interests, since it is the social interest in securing the individual interest that must determine the law to secure it. But using interest to mean a claim which a human being or a group of human beings may make, it is convenient to speak of individual interests, public interests, — that is, interests of the state as a juristic person, — and social interests, — that is, interests of the community at large. This is the order in which they have been recognized in the development of juristic thought.

Although certain great social interests have determined the growth of law from the beginning, individual interests were the first to be worked out critically. The social interest in general security required that these interests be provided for in order to prevent self-redress and private war. For nearly three centuries

pressure upon the law to meet these interests increases the scope and character of legal rights.

now, philosophical jurisprudence has devoted itself to this task. The more important of them have become well known to us under the name of natural rights. Usually they have been deduced from the qualities of man in the abstract or from some formula of right or justice. But the practice of jurists has often been sounder than their theories have been. So far as individual interests go, the sociological jurist has little to do beyond essaying to supply a better theoretical foundation.

With respect to public interests, the situation is very different. These were first thought of as individual interests of the personal sovereign and hence were worked out originally in jurisprudence on the analogy of individual interests. Moreover, since the sovereign is, as it were, the guardian of social interests,[3] these also were at first treated as individual interests of the sovereign and worked out on the same analogy of private rights. Hence there is much confused thinking in jurisprudence at this point. General social interests and interests of the state as a juristic person are not differentiated, and both are spoken of as "rights" of the state. The persistence in American public law of the royal prerogative of dishonesty, and the resistance of American lawyers to attempts to introduce ideas on this subject which are familiar to the rest of the world, afford but another instance of the practical effect of theoretical confusion in retarding the growth of the law.

Turning to social interests, the sociological jurist has in a sense a clear field. As such we have only begun to recognize them. Yet the social interest in general security was the first interest secured by the law. It is not too much to say that law came into being to secure this interest. Unhappily, in the nineteenth century legal history was written from an individualist standpoint and was interpreted as a development of restrictions on individual aggression in the interest of individual freedom of action. When

[3] At common law the king was *parens patriæ*, that is, he was guardian of social interests of all kinds and hence his courts of law and equity had a general superintendence of all manner of matters where social interests might be jeopardized. Coke, Second Institute, 199; Blackstone, Commentaries, II, 427, III, 110, 112, 362; Attorney-General *v.* Newman, 1 Ch. Cas. 157 (1735); Attorney-General *v.* Richards, 2 Anstr. 603, 606 (1794). As the king enforced the duties imposed to secure these interests, the common-law lawyer naturally thinks here of rights of the state. See Pollock, First Book of Jurisprudence, 3 ed., 64–65.

we recognize that this was a mistake and that the social interest in general security dictated the very beginnings of law, so that individual rights were only a means gradually worked out for furthering this social interest, and rewrite our legal histories accordingly, we shall be able to make historical jurisprudence more effective.[4] In the same way much that has been written as to individual natural rights, when recast from the standpoint of a social interest in security of acquisitions, may be made useful. But the jurist cannot work alone at this task. In order to construct a scheme of social interests that will serve the jurisprudence of tomorrow as the thoroughly elaborated schemes of natural rights served the jurisprudence of yesterday, the social sciences must coöperate. This does not mean that any jurist shall take all the social sciences for his province. It does mean, however, that he shall know that they all have materials for him and shall be willing and able to go to them therefor.

2. Individual Interests[5]

Individual interests which it is conceived the law ought to secure are usually called "natural rights" because they are not the creatures of the state and it is held that the pressure of these interests has brought about the state. In the stage of equity or natural law, when what ought to be law is made the test of what is, it is natural to confuse the interests which the law does secure, the interests it ought to secure, and the means of securing them under the one name of "rights." Those which are secured and the means whereby they are secured are called legal rights; those which ought to be secured are called natural rights. The usual mode of proceeding has been to deduce natural rights from a supposed social compact or from the qualities of man in the abstract or from some formula of right or justice. The first was abandoned after Kant. With respect to the second, Wundt has said justly:

[4] Although he confuses the sociological conception of law with the conception of the historical school, Mr. Abbot's critique of sociological jurisprudence assumes the conventional interpretation of legal history. Justice and the Modern Law, 8–13. When some historian writes the history of juristic and judicial lawmaking viewed as social functions, it will be easy to vouch history for the other side. See my paper, Legislation as a Social Function, 18 American Journal of Sociology 755.

[5] Brown, The Underlying Principles of Modern Legislation, chs. 7–8; Abbot, Justice and the Modern Law, ch. 1; Spencer, Justice, chs. 9–18. See also n. 1, p. 343.

"Man *in abstracto*, as assumed by philosophies of law, has never actually existed at any point in time or space." [6]

With respect to the third, we may note that, as such formulas of right and justice in the nineteenth century were individualistic, we got in this way a scheme of fundamental individual rights, — that is, individual interests which the law ought to secure, — above and beyond the reach of the state, which it was conceived the state could and must secure, but from which it was conceived the state could not derogate. The same conception was reached, indeed, by the second mode of treatment, that is, by deduction from the qualities of man in the abstract, because man in the abstract was conceived of as the individual man and not as the social man. Anglo-American juristic thinking has been especially insistent upon this conception of fundamental individual rights which, as natural rights, are quite above and beyond the reach of the state and to which social interests must yield.[7]

While it is true that the law recognizes individual interests but does not create them, it is quite as untrue that the law exists primarily in order to secure them or that state and law result simply from the pressure of such interests. As social institutions, state and law exist for social ends, and from the beginning have recognized and secured individual interests as a means thereto.

"The moral criterion by which to try social institutions and political measures may be summed up as follows: The test is whether a given custom or law sets free individual capacities in such a way as to make them available for the development of the general happiness or the common good. The formula states the test with the emphasis falling upon the side of the individual. It may be stated from the side of associated life, as follows: The test is whether the general, the public, organization and order, are promoted in such a way as to equalize opportunity for all." [8]

[6] Ethics (trans. by Titchener and others), III, 160.

[7] Blackstone, Commentaries, I, 129 ff., especially 139; Calder *v.* Bull, 3 Dall. (U. S.) 386 (1798); Fletcher *v.* Peck, 6 Cranch (U. S.) 87 (1810); Loan Association *v.* Topeka, 20 Wall. (U. S.) 655, 662 (1874); Butchers' Union, etc. Co. *v.* Crescent City, etc. Co., 111 U. S. 746, 762 (1884); Chicago, B. & Q. R. Co. *v.* Chicago, 166 U. S. 226, 237 (1897); Wynhamer *v.* People, 13 N. Y. 378, 387 (1856); Matter of Jacobs, 98 N. Y. 98 (1885); People *v.* Marcus, 185 N. Y. 257 (1906); Beal *v.* Chase, 31 Mich. 491 (1875); *In re* House Bill 203, 21 Col. 27, 39 Pac. 431 (1895); Braceville Coal Co. *v.* People, 147 Ill. 66, 35 N. E. 62 (1893). See Berolzheimer, System der Rechts- und Wirtschaftsphilosophie, II, 160.

[8] Dewey and Tufts, Ethics, 482–483.

It is important to remember that the progress of civilization has given rise to many of these individual interests and that the growth of law has made men conscious of them. For the growth of law and the growth of consciousness of individual interests have gone on together. Recognition of such interests is relatively late in the development of law. The first interests to be recognized are group interests. With economic development, individual interests gradually arise out of these and come to be recognized. In the Roman law, recognition of the individual human being as the subject of rights, or, in other words, as having individual interests which the law should secure, is a doctrine of the *ius naturale*.[9] But even the Roman law of the classical period did not recognize private rights in the sense of our eighteenth- and nineteenth-century jurisprudence. This is especially true of the interest of substance or, as it is called, the natural right of property.[10]

In speaking of the administration of law by the British in India, Maine says:

"If I had to state what for the moment is the greatest change which has come over the people of India . . . I should say it was the growth on all sides of the sense of individual legal right; of a right, not for the total group, but for the particular member of it grieved, who has become conscious that he may call in the arm of the state to force his neighbors to obey the ascertainable rule." [11]

Again, in speaking of the breaking up of village communities in India, he says:

"The probability, however, is that the causes have had their operation much hastened by the English, but have not been created by them. The sense of personal right, growing everywhere into greater strength, and the ambition which points to wider spheres of action than can be found within the community are both destructive of the authority of its internal rules." [12]

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[9] Dig. L, 17, 32; XXVIII, 1, 20, § 7; XXVIII, 8, 1; XLVIII, 10, 7.

[10] Compare, for example, the ideas as to freedom of testamentary disposition in eighteenth- and nineteenth-century juristic thinking with the Roman law. Spencer, Justice, § 68; Miller, Philosophy of Law, 311; Miraglia, Comparative Legal Philosophy (Lisle's trans.), § 510; Beaussire, Les principes du droit, 265–271; Boistel, Philosophie du droit, I, § 270. See also Hegel, Grundlinien der Philosophie des Rechts, § 180 (Dyde's trans., 184).

[11] Village Communities, 7 ed., 73.

[12] *Id.*, 112.

Accordingly he tells us that partition of inheritances is demanded to-day everywhere in India and that:

"the brethren of some one family are always wishing to have their shares separately." [13]

What Maine saw going on in India in his time, legal history shows us has gone on in all systems.[14] Up to the end of the eighteenth century the whole course of development of the law had been to disentangle individual interests from group interests and to protect and secure these individual interests by legal rights.

We may say, then, that the law slowly worked out a conception of private rights as distinguished from group rights. This culminated in the eighteenth century in a working out of individual interests as distinguished from public interests, to which our bills of rights, in which the natural rights of the individual are solemnly asserted against the state, still bear witness.[15] Next the law began to work out social interests as such and to endeavor to reach a balance between individual interests and social interests. But there is a social interest in the individual moral and social life. In securing individual interests to this end, the law is securing a social interest. Therefore the problem ultimately is not to balance individual interests and social interests, but to balance this social interest with other social interests and to weigh how far securing this or that individual interest is a suitable means of achieving the result which such a balancing demands.

Individual interests may be classified as (*a*) interests of personality, — the individual physical and spiritual existence; (*b*) domestic interests, — "the expanded individual life;" [16] and (*c*) interests of substance, — the individual economic life.

All classifications are more or less arbitrary, and the foregoing also may seem to be of that character. For instance, defamation infringes both personality and substance, since one's reputation is an asset as well as a part of his personality. Indeed Spencer, in his discussion of natural rights, includes reputation under incorporeal property.[17] Again, malicious prosecution of a civil

[13] Village Communities, 7 ed., 113.

[14] See *post*, p. 356.

[15] See Declaration of Rights of Virginia (1776), art. 1; Déclaration des droits de l'homme et du citoyen (1789), art. 2; Déclaration des droits de l'homme et du citoyen (1793), art. 1.

[16] Paulsen, Ethics (Thilly's trans.), 634.

[17] Justice, § 62.

action may infringe both personality and substance. Again, the common-law action for seduction is in form based on an injury to substance, not on an injury to a domestic interest. In fact, in the common-law system, injuries to domestic relations generally are in form viewed as infringements of interests of substance. But this is due to historical reasons. Along with so many other anomalies of our law, it arose from the exigencies of the action on the case, which was the only available remedy at common law. In consequence not only is this mode of viewing such injuries unjustifiable analytically, but it is largely disappearing in the modern law of torts. With the general development of law the lines between these interests are clearing and it is becoming apparent that the remedy must be applied with reference not to the act, but to the exact interest or interests which that act infringes.

Many German jurists put domestic interests under interests of personality.[18] Some of them put all individual interests in the first group,—that is, they regard all individual interests as interests of personality.[19] The threefold distinction suggested above was made by Kant. He distinguished natural rights as (*a*) personal, that is, involving the physical person; (*b*) personal but real in kind, that is, having a certain relation to substance also; and (*c*) real, that is, involving the relations of individuals to things.[20] Hegel criticizes this classification, arguing that all individual interests are interests of personality because, as he holds, all natural rights flow from the principle of respect for the free will of others.[21] The central position of the free will in all legal philosophy in the nineteenth century led to a general acceptance of this view, and the indirect influence of the socialist jurists in Europe, who object to individual interests of substance, has kept it alive in the attempt to include as much as possible in what is taken to be an unimpeachable interest of personality. In the best recent discussion of the matter Adler prefers to confine the interest of personality to the physical person and the so-called spiritual person.[22]

[18] *E. g.*, Lasson, System der Rechtsphilosophie, § 48, par. 6.

[19] Gareis, Science of Law (Kocourek's trans.), 122–135; Gierke, Deutsches Privatrecht, I, 702.

[20] Metaphysische Anfangsgründe der Rechtslehre, §§ 11, 18, 24.

[21] Grundlinien der Philosophie des Rechts, § 40, n.

[22] Die Persönlichkeitsrechte im allgemeinen bürgerlichen Gesetzbuch, Festschrift zur Jahrhundertsfeier des allgemeinen bürgerlichen Gesetzbuches, 165.

3. PERSONALITY [23]

How shall we arrive at the interests of personality which the law ought to secure? To put it as the question would have been put formerly, How shall we construct a scheme of natural rights of personality? It has been said that the usual method has been to deduce them from the qualities of man in the abstract or from some supposed formula of right and justice. The latter was the method of the nineteenth century. A sketch of what may be taken as a fair example of a nineteenth-century scheme of natural rights will illustrate this method. The scheme in question is to be found in Spencer's Justice. Although it purports to be based upon principles of evolution, it starts from what is essentially Kant's formula of right, taken as a formula of justice,[24] and from this formula deduces seven rights.[25] Each right is then confirmed by seeking to show that in the evolution of society and of law it has been recognized in continually increasing measure, and that the tendency is to recognize it to the full extent of the principle reached by deduction. Although the terminology is positivist, the mode of procedure is in substance a combination of the metaphysical and the historical methods as theretofore employed. First the right is deduced from the principle. The scheme of rights is shown to be a logical development of the formula of justice. Then it is shown that the rights recognized among civilized peoples represent an unfolding of the same principle in the same way in human experience. Considering simply the philosophical side, the scheme of seven natural rights is as follows:

(1) The right to physical integrity. Spencer deduces this from his definition of justice in this way: If the actions of one person are carried so far as directly to inflict physical injury upon another, they go beyond the limitation of his liberty by the like

[23] Gareis, Science of Law (Kocourek's trans.), 122–135; Adler, Die Persönlichkeitsrechte im allgemeinen bürgerlichen Gesetzbuch, Festschrift zur Jahrhundertsfeier des allgemeinen bürgerlichen Gesetzbuches; Geyer, Geschichte und System der Rechtsphilosophie, 137–142; Stahl, Philosophie des Rechts, 5 ed., 312–350.

[24] See Maitland, Collected Essays, II, 274–284; Spencer, Justice, app. A.

[25] Spencer, Justice, chs. 9–18. I have abridged the scheme somewhat by putting the ten rights which Spencer enumerates into seven, without, however, altering the substance, as he himself states that some of the rights he discusses are but phases of others.

liberties of all; they are, therefore, unjust and may be the subject of legal interference. It should be noted that in his view this interference with the individual has to be justified because it is interference with a fundamental natural right. It is held to be justified in this case by consideration of the like natural rights of other individuals. In this way Spencer deduces the natural right of each individual to have his physical integrity respected by his fellows.

(2) The right to free motion and locomotion, or, as it is usually called by writers on the common law, the right of personal liberty. Here, it is said, an obvious deduction from the formula of justice, — "the liberty of each limited only by the like liberties of all," — requires that each individual be at liberty to make free use of his limbs and to move about freely from place to place, except as by such conduct he interferes with like action on the part of his fellow men or with some other natural right of his fellow men.

(3) The right to the use of natural media. This is deduced as follows: If one individual interferes with the relations of another to the physical environment upon which the latter's life depends, he infringes the like liberties of others by which his own are measured. This so-called natural right to the use of natural media is a curious example of the extreme individualism of nineteenth-century philosophical jurisprudence. It is true that in all systems of law some things are held to be incapable of ownership by individuals. It is usually said of such things in the law books that they are "common to all mankind" and that their appropriation by individuals is forbidden by natural law. Thus, the Institutes of Justinian say:

> "By the law of nature . . . the following things are common to all men: air, running water, the sea, and consequently the shore of the sea." [26]

Again, an eighteenth-century writer says:

> "Some things are by nature incapable of appropriation, so that they cannot be brought under the power of any one. These got the name of *res communes* by the Roman law and were defined things the property of which belongs to no person but the use to all. Thus the light, the air, running water, and so forth are so adapted to the common use

[26] Inst. II, 1, § 1

of mankind that no individual can acquire a property in them or deprive others of their use." [27]

It will be observed that down to the nineteenth century, jurists had said that natural law decreed a common interest in natural media and forbade any separate individual interest. Here, however, we find a philosopher in the nineteenth century insisting on an individual natural right to the use of these media which precludes individual ownership. It is interesting to note that recently a third doctrine has grown up, namely, that there is a public interest in these natural media so that they are not *res communes* but *res publicæ*.[28] Perhaps nothing could illustrate more clearly the purely personal character of all such schemes of natural rights.[29]

(4) The right of property. The mode in which this is deduced must be considered more fully elsewhere.[30] Under this right

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[27] Erskine, Institute of the Law of Scotland, I, 146.

[28] See the statutes in Wiel, Water Rights, 3 ed., I, §§ 6, 120; *Ex parte* Bailey, 155 Cal. 472, 101 Pac. 401 (1909); Geer *v.* Connecticut, 161 U. S. 519 (1896).

[29] Thus: "No court would hesitate to declare void a statute which enacted that A. and B., who were husband and wife to each other, should be so no longer, but that A. should thereafter be the husband of C. and B. the wife of D." Miller, J., in Loan Ass'n *v.* Topeka, 20 Wall. 655, 662 (1874). But Lord Holt, who agreed that there are limitations on legislative authority imposed by natural law says that parliament "may make the wife of A. to be the wife of B." City of London *v.* Wood, 12 Mod. 669 (1692). Mr. Justice Miller wrote when legislative divorce had become obsolete almost everywhere. In Lord Holt's time a divorce *a vinculo* could be had only in parliament. See also the statement of Curtis, J., in Scott *v.* Sandford, 19 How. (U. S.) 393, 626 (1856), that "all writers" agree that slavery "is created only by municipal law." But Aristotle (Politics, bk. I, ch. 5), Grotius (II, 5, 27, § 2 and 29, § 2), and Rutherforth (Natural Law, bk. I, ch. 20, § 4), who are not insignificant authorities, argue that slavery has a natural basis in some cases beyond and apart from law. Again, in Wynhamer *v.* People, *supra*, 454, Hubbard, J., said: "Liquor is not a nuisance *per se, nor can it be made so by a simple legislative declaration.*" Since that time people have changed their minds, and we find another judge saying: "The entire scheme of prohibition as embodied in the Constitution and laws of Kansas might fail, if the right of each citizen to manufacture intoxicating liquors for his own use or as a beverage were recognized. *Such a right does not inhere in citizenship.*" Harlan, J., in Mugler *v.* Kansas, 123 U. S. 623 (1887).

"We think that, aside from the positive law, there exist only the opinions of authors, which respond more or less to the needs of society." Antoine, Introduction to Fiore, Nouveau droit international public, ii. *Cf.* Bentham, Principles of Morals and Legislation, 17, n. 1.

[30] See Ely, Property and Contract in their Relation to the Distribution of Wealth, ch. 22.

Spencer includes (*a*) tangible or corporeal property; (*b*) incorporeal property, under which, curiously enough, he includes reputation as the result of a man's good conduct, along with patent and copyright; and (*c*) the right of gift and bequest, which he regards as consequences of complete ownership. The inclusion of reputation under incorporeal property appears to illustrate the effect of propinquity upon philosophical ideas. For it must be admitted that for many purposes English law does base its law of defamation on an interest of substance rather than on an interest of personality. The basis of the "right of bequest" or testamentary disposition must also be considered more fully elsewhere.[31]

(5) The right of free exchange and free contract. This is deduced as a sort of freedom of economic motion and locomotion in the same manner as the right of physical motion and locomotion.

(6) The right of free industry. This is said to be a modern outgrowth of the right of free motion and locomotion, being, as it were, a right of economic motion and locomotion.

(7) The right of free belief and opinion. This also is said to be a modern development of the right of free motion and locomotion. It is deduced as a right of free mental motion, a right of exercising complete freedom in one's mental movements so far as like freedom on the part of others is not affected thereby. Two phases of this right are treated as two separate rights, namely, freedom of religious belief and opinion and freedom of political belief and opinion.

If we reject the mode of determining individual natural rights illustrated by the foregoing scheme, as I think we must, how are we to define the individual interests which the law ought to secure? The pragmatist would answer that we should take for our starting point the proposition of William James which I have discussed elsewhere in this connection,[32] namely, that all demands which the individual may make are to be met so far as they are not outweighed by other demands of (*a*) other individuals, (*b*) the organized public, (*c*) society. The principles by which we are to

[31] See Ely, Property and Contract in their Relation to the Distribution of Wealth, ch. 17.

[32] The Philosophy of Law in America, Archiv für Rechts- und Wirthschaftsphilosophie, VII, 213; Legislation as a Social Function, 18 American Journal of Sociology 755.

determine how far they are so outweighed must be considered elsewhere.[33] Some have preferred to say that all "reasonable demands" are to be met so far as possible.[34] Reason requires limitation of the demands of each with reference to those of others and of all, and sometimes, it may be, limitation of the demands of society with reference to those of individuals. But why? Because all cannot be satisfied. If our aim is to satisfy all so far as we can, then reason is employed in the selection of those which we will satisfy and of the limits within which we shall satisfy them. Accordingly the first task is simply to ascertain what demands the individual conceivably may make as incident to personality. It will be convenient to take these up under three heads, namely, the physical person, honor (reputation), and belief and opinion.

4. The Physical Person[35]

Inviolability of the physical person is universally put first among the demands which the individual may make. This interest, called by Paulsen the interest in body and life,[36] includes the so-called natural rights of physical integrity and of personal liberty or, as Spencer styles it, free motion and locomotion. Passing for the moment all consideration of the limits within which this interest must be confined when recognized, three questions may be taken up: (1) What is the extent of the interest as an individual interest; that is, what may the individual demand in this connection which, therefore, the law is to secure so far as may be? (2) How far has this interest been recognized by legal systems in the past and how has legal recognition of this interest developed? (3) How far is this interest protected by law to-day?

We may conceive the interest in the physical person as cover-

[33] See my paper, Legislation as a Social Function, 18 American Journal of Sociology 755.

[34] Centralization and the Law, 154. See Willoughby, Social Justice, 20 ff.

[35] Green, Principles of Political Obligation, §§ 148–151; Wigmore, Summary of the Principles of Torts (Cases on Torts, II, app. A), §§ 12–26; Miller, Philosophy of Law, lect. XI; Amos, Systematic view of the Science of Jurisprudence, 287–297; Post, Ethnologische Jurisprudenz, II, § 102; Blackstone, Commentaries, II, 119–138. I am indebted to Professor E. R. Thayer for assistance and for many suggestions in connection with this section.

[36] Ethics (Thilly's trans.), 633.

ing five points. The first and most obvious is immunity of the body from direct or indirect injury. Second and closely related is the preservation and furtherance of bodily health. Third and hardly less important is immunity of the will from coercion, freedom of choice, and judgment as to what one will do. These three interests have long been recognized. Two more have become important with the progress of civilization, namely, immunity of the mind and the nervous system from direct or indirect injury and the preservation and furtherance of mental health,—freedom from annoyance which interferes with mental poise and comfort. Perhaps it may be objected that we have no warrant for thus distinguishing mental health and the security of the nervous system from bodily health and the security of bone and muscle. But history and certain practical considerations require that these be considered apart, whatever a stricter abstract adherence to biological science might otherwise dictate.[37]

Injuries to the body are the first wrongs dealt with in the history of law. But they are not thought of at first as infringements of an individual interest. Rather they are thought of as involving infringement of an interest of a group or kindred or of a social interest in peace and good order. They are taken to involve affront to the kindred whose kinsman is assailed, or it is taken that a desire for revenge will be awakened, and hence that they involve danger of private vengeance and private war.[38] It is not an individual interest which is regarded, but a group interest. Hence the remedy (composition) is imposed to secure the social interest in peace and order, not to vindicate an individual private right. Often in primitive law a composition is payable to the kindred as well as to the person injured. Likewise in case of killing, the *wer* is payable to the kindred, not to dependents; it is exacted to satisfy vengeance for an insult to the kindred, not to compensate those who are deprived of support.[39] At first, then, the ideas are (1) a group interest against insult and (2) a social interest against disorder, rather than an individual interest in the physical person.

[37] On the other hand, for like reasons, the common law deals with nervous injuries which leave no physical signs and mental injury without much discrimination. Spade *v.* Railroad Co., 168 Mass. 285, 47 N. E. 88 (1897).

[38] The latter idea is perhaps still behind the common law of libel as a misdemeanor. Blackstone, Commentaries, IV, 150.

[39] See Amira, Grundriss des germanischen Rechts, § 54.

Out of these evolves slowly the idea of an individual interest secured by an individual right.

Again, when the individual interest is recognized, it is regarded at first as an interest in one's honor, in one's standing among brave men regardful of their honor, rather than as an interest in the integrity of the physical person. In Greek law every infringement of the personality of another is ὕβρις (*contumelia*); the injury to honor, the insult, being the essential point, not the injury to the body.[40] In Roman law, injury to the person is called *iniuria*, meaning originally insult, but coming to mean any willful disregard of another's personality.[41] In consequence the beginnings of law measure composition not by the extent of the injury to the body, but by the extent of the injury to honor and the extent of the desire for vengeance thus aroused,[42] since the interest secured is really the social interest in preserving the peace.

While the law secures the interest of the individual in his honor at least as soon as his interest in his physical person, when presently it distinguishes between injuries to the person and injuries to honor or reputation, it moves very slowly in protecting feelings in any respect other than against insult or dishonor. Three steps may be noted. At first only physical injury is considered. Later overcoming the will is held a legal wrong; in other words, an individual interest in free exercise of the will is recognized and secured. Finally the law begins to take account of purely subjective mental injuries to a certain extent and even to regard infringement of another's sensibilities.

With respect to the interest in free exercise of the will, the Roman law of the stage of strict law (*ius civile*) and the common law agreed in holding transactions entered into under duress to be legally binding.[43] In each system in the stage of infusion of morals into law, equity intervened to set aside legal transactions resulting from coercion. Roman law went further. On equitable grounds it worked out a special wrong (*metus*) of unlawfully overcoming another's will and developed an action for reparation of

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[40] Hermann, Lehrbuch der griechischen Rechtsaltertümer, 4 ed., § 6.

[41] Gaius, III, §§ 220–222; Inst. IV, 4; Dig. XLVII, 10, 16.

[42] See my paper, The End of Law as Developed in Legal Rules and Doctrines, 27 HARV. L. REV. 195, 198.

[43] *Id.*, 204.

the injury resulting therefrom.[44] The common law did not recognize a tort of duress as such, not even to the extent of allowing recovery by way of reparation for what one did through coercion as an incident of recovery for the physical injury with which it was connected. But recovery by way of restitution came to be allowed on equitable principles as upon quasi-contract in order to prevent unjust enrichment.[45] The law on this point grew slowly. In the Roman and the modern Roman law it seems to have passed through four stages. In the first three stages there is a purely objective standard. The law does not ask whether this man's will was in fact overcome by wrongful pressure brought to bear upon him in this case, but asks instead what was the character of the pressure employed. In the first stage the objective standard made use of is peril of life or limb, — actual or threatened bodily suffering. Any pressure short of that is not regarded.[46] In the second stage there is still an objective test, but it is more liberal. The law asks whether the will of a reasonable or standard man would have been overcome by the pressure employed.[47] In the third stage there is a further liberalizing of the objective standard. The law asks whether the evil threatened was a serious one or, as some civilians put it, whether the complainant yielded to fear of "a not-inconsiderable evil." [48] Finally the new German code adopts a purely subjective standard, asking only, Did the unlawful pressure employed in this case actually overcome the will? [49] It is required that the pressure be unlawful because if,

[44] Dig. IV, 2, 1; IV, 2, 14, §§ 3, 5; IV, 2, 16, § 2.

[45] Astley *v.* Reynolds, 2 Stra. 915 (1782).

[46] Dig. IV, 2, 2; IV, 2, 3; Code, II, 4, 13. By way of comparison it may be noted that Blackstone so defines duress in our law, laying down that there must be threat of immediate harm to life or limb or else imprisonment. Commentaries, I, 130–131.

[47] Dig. IV. 2, 6.

[48] Dig. IV, 2, 5; Windscheid, Pandekten, I, § 80, n. 6; Dernburg, Pandekten, I, § 91, par. 2; Regelsberger, Pandekten, I, § 144, n. 8.

[49] Civil Code, § 123; Crome, System des deutschen bürgerlichen Rechts, I, 432. It should be noted that Anglo-American law is going through a similar course of development. Blackstone's formula, which is that of the first stage of the Roman law, has been cited *supra*. In the nineteenth century the cases commonly apply the objective test of what is "sufficient to overcome the mind and will of a person of ordinary firmness." Brown *v.* Pierce, 7 Wall. (U. S.) 205 (1868); James *v.* Dalbey, 107 Ia. 463, 78 N. W. 51 (1899); Railroad Co. *v.* Pattison, 41 Ind. 312, 320 (1872); Fellows *v.* School District, 39 Me. 559 (1855); Tapley *v.* Tapley, 10 Minn. 448 (1865); Davis *v.* Railroad Co., 46 Miss. 552, 568 (1872); Edwards *v.* Bowden, 107 N. C.

to secure some other interest, the law recognizes the pressure as legal, then, in a weighing of interests the individual interest in freedom of will may have to give way.[50] As to the main point, it would seem that the subjective standard is the one that ought to be adopted. So far as the objective standard subserves a useful purpose in preventing fraud and so maintaining the social interest in security of transactions, the end may be attained by requiring a proper *quantum* of proof in such cases and by treating considerations of what a reasonable man would do as of evidentiary value. The objective standard is a survival from the extreme individualism of the strict law and its reluctance to set aside acts done in due legal form.

Injury to the nervous system, mental injury, and injury to sensibilities, where there is no physical impact or no injury to substance or to any relation, is a new problem of modern law. Here also development has been slow and cautious, partly because the law on this subject has had to be made in a period of legal stability, but partly also because of practical limitations upon the enforcement of legal rules and hence upon the securing of interests thereby. A nervous derangement manifested objectively is like any bodily illness. But our law does not protect against purely subjective mental suffering except as it accompanies or is incident to some other form of injury and within certain disputed limits.[51] There are obvious difficulties of proof in such

58, 12 S. E. 58 (1890). But courts frequently define duress in terms of the subjective criterion. Cribbs *v.* Sowle, 87 Mich. 340, 49 N. W. 587 (1891); Phillips *v.* Henry, 160 Pa. St. 24, 28 Atl. 477 (1894); Galusha *v.* Sherman, 105 Wis. 263, 81 N. W. 495 (1900). In actual application the tendency seems to be toward the subjective criterion.

[50] *E. g.*, a threat to sue or to levy execution where one has a right to do so in order to secure an interest of substance, although results disastrous to the debtor would follow. Emmons *v.* Scudder, 115 Mass. 367 (1874). *Cf.* Dig. IV, 2, 3.

[51] "A factor which we may for the sake of convenience refer to as the parasitic element of damage. The idea which is meant to be brought out by the use of this expression is that in certain situations the law permits elements of harm to be considered in assessing the recoverable damage which cannot be taken into account in determining the primary question of liability. It is only under this head that such factors as insult, disgrace, and anguish of feeling can get legal recognition at all." Street, Foundations of Legal Liability, I, 461. A striking instance may be seen in Floyd *v.* Atlantic Coast Line R. Co., 83 S. E. 12 (N. C., 1914), where a mother sued for mental anguish caused by the negligent mutilation of the dead body of her boy. As the right to possession of the body for the purposes of burial was in her husband

cases, so that false testimony as to mental suffering may be adduced easily and is very hard to detect.[52] Hence this individual interest has to be balanced carefully with a social interest against the use of the law to further imposture. For these reasons courts, thinking more of the practical problem of proof than of the logical situation, have looked to see whether there has been some bodily impact or some wrong infringing some other interest, which is objectively demonstrable, and have put nervous injuries which leave no physical record and purely mental injuries in the same category.[53] In case of nervous injury or mental suffering along with other injury as a result of bodily impact, considerations of what would naturally happen to persons of normal sensibilities enable the law to meet the practical difficulties. This is true also where there has been an infringement of some other interest in itself raising a right of action.[54] But if there is no physical impact and there is no independent right of action for a coincident injury, the practical difficulties weigh heavily. The case which best illustrates the problem is one in which fright or nervous shock results in or develops into palpable physical injury. In one type of this case the fright or nervous shock was caused by the defendant's negligence. Attempt has been made to dispose of the question by resorting solely to the principle of remoteness.[55]

as next of kin, and hence there was no infringement of any interest of the mother other than that involved in the injury to feelings and sensibilities, recovery was denied.

[52] *Cf.* the remarks of the court in Huston *v.* Freemansburg, 212 Pa. St. 548, 61 Atl. 1022 (1905).

[53] Spade *v.* Railroad Co., 168 Mass. 285, 47 N. E. 88 (1897); Dulieu *v.* White, [1901] 2 K. B. 669. But see Yates *v.* South Kirkby Collieries, Ltd., [1910] 2 K. B. 538.

[54] Bouillon *v.* Laclede Gas Light Co., 148 Mo. App. 462, 129 S. W. 401 (1910); Tennessee Cent. R. Co. *v.* Brasher, 97 S. W. 349 (Ky., 1906); Nordgren *v.* Lawrence, 74 Wash. 305, 133 Pac. 436 (1913). "The treatment of any element of damage as a parasitic factor belongs essentially to a transitory stage of legal evolution. A factor which is to-day recognized as parasitic will, forsooth, to-morrow be recognized as an independent basis of liability. It is merely a question of social, economic, and industrial needs as those needs are reflected in the organic law." Street, Foundations of Legal Liability, I, 470.

[55] Victorian Railway Com'rs *v.* Coultas, 13 App. Cas. 222 (1888) (no recovery); Green *v.* Shoemaker, 111 Md. 69, 73 Atl. 688 (1909) (recovery allowed). See Wigmore, Summary of the Principles of Torts, § 15. "Do not some courts, in laying down the rule of legal cause, proceed upon the supposition that one problem before them is to determine when to exempt a tortfeasor from liability for effects which were in reality caused by his tort?" Smith, Legal Cause in Actions of Tort. 25 HARV. L. REV. 103. In other words, questions of "legal cause" or "remoteness" are often used

But the better decisions among those which deny recovery proceed frankly upon considerations of what is practicable, that is, upon a balancing of interests.[56] In another type of this case the nervous or mental shock which caused the physical injury was inflicted intentionally. Here the difficulties are less than in the first type and the better judicial view allows recovery.[57] But there are courts that will not go so far and there are limits. If the defendant intended to bring about the physical harm which followed, there would seem no occasion for requiring more.[58] If, however, the defendant did not intend the physical harm, but only a mild fright or mild nervous shock which would work no further harm in a person of ordinary nerves and normal sensibilities, the accepted rule seems to be that there should be no recovery.[59] In cases of negligence the individual interest of the actor, — that is, his interest in the free exercise of his faculties, — must be weighed as well as the social interest against imposture and the practical difficulties of proof and reparation. Where he exercises his facul-

by the courts subconsciously to cover a balancing of other interests against the individual interest.

[56] "As has been explained repeatedly, it is an arbitrary exception, based upon a notion of what is practicable that prevents a recovery for visible illness resulting from nervous shock alone. . . . But when there has been a battery and the nervous shock results from the same wrongful management as the battery, it is at least equally impracticable to go further and to inquire whether the shock comes through the battery or along with it. Even were it otherwise, recognizing as we must the logic in favor of the plaintiff when a remedy is denied because the only immediate wrong was a shock to the nerves, we think that when the reality of the cause is guaranteed by proof of a substantial battery of the person there is no occasion to press further the exception to general rules." Holmes, C. J., in Homans *v.* Boston E. R. Co., 180 Mass. 456, 62 N. E. 737 (1902). In a prior case the same judge said: "The point . . . is not put as a logical deduction from the general principles of liability in tort, but as a limitation of those principles on purely practical grounds." Smith *v.* Postal T. Co., 174 Mass. 576, 55 N. E. 380 (1899). *Cf.* also Driscoll *v.* Gaffey, 207 Mass. 102, 92 N. E. 1010 (1910). But see Green *v.* Shoemaker, *supra*, where the court denies that these practical considerations are sufficient to preclude recovery where physical injury has resulted from fright, though it says no action will lie for mere fright which does not result in a physical injury.

[57] Wilkinson *v.* Downton, [1897] 2 Q. B. 57; Garrison *v.* Sun Pub. Co., 207 N. Y. 1, 100 N. E. 430 (1912). But see Stevens *v.* Steadman, 140 Ga. 680, 79 S. E. 564 (1913).

[58] See remarks of Holmes, C. J., in Silsbee *v.* Webber, 171 Mass. 378, 380, 50 N. E. 555, 556 (1898).

[59] Nelson *v.* Crawford, 122 Mich. 466, 81 N. W. 335 (1899). See Bohlen, Right to Recover for Injury Resulting from Negligence without Impact, 41 Amer. L. Reg. 141.

ties for purposes recognized by law and, so far as he could reasonably foresee, does nothing that would work an injury, the individual interest of the unduly sensitive or abnormally nervous must give way. But the law does not secure individuals in the free exercise of their faculties for the purpose of injuring others, since obvious social interests are opposed to such a claim. Hence, if there was an intention to injure, only the social interest against imposture and the practical difficulties are to be weighed. This is the philosophical basis of the distinction made in these cases. Probably advance in our knowledge of psychology and mental pathology and progress in means of arriving at the truth in matters where expert evidence is required will determine the development of the law upon this subject. So long as the margin for imposture and the scope of pure expert conjecture remain as large as they are at present, this phase of the interest of personality must remain in some measure insufficiently secured.

Where the injury is to mental comfort only, the practical difficulties are still greater. Hence the law can recognize an "interest in the peace and comfort of one's thoughts and emotions" [60] only to a limited extent. In the first place, an objective standard is required here by the social interest with which the individual interest must be balanced. Hence the tendency of the law to secure an interest in mental comfort only to the extent of ordinary sensibilities of ordinary men, and then only when the mental suffering is caused by and involved in the infringement of some other interest.[61] In other words, here again the law does not secure the whole demand which the individual may make, but it does secure the interest in case of ordinary sensibilities where there is also an objective injury. Thus, no doubt, it secures the interest in the general run of cases for the average man. No more may well be attempted with our present means of proof and in view of the inapplicability to such injuries of the means of redress known to our law.

Another phase of the same interest is the demand which the individual may make that his private personal affairs shall not be laid bare to the world and be discussed by strangers. Such an interest is the basis of the disputed legal right of privacy.[62] It is

[60] Wigmore, Summary of the Principles of Torts, § 19. [61] *Id.*, § 20.
[62] Warren and Brandeis, The Right to Privacy, 4 HARV. L. REV. 193.

a modern demand, growing out of the conditions of life in the crowded communities of to-day, and presents difficult problems. The interest is clear. Such publicity with respect to private matters of purely personal concern is an injury to personality. It impairs the mental peace and comfort of the individual and may produce suffering much more acute than that produced by a mere bodily injury. But, as the injury is mental and subjective, the difficulties already considered must, at least, confine legal securing of the interest to ordinary sensibilities. Here, as in many other cases, in a weighing of interests the over-sensitive must give way. For over and above the difficulties in mode of proof and in applying legal redress, social interests in free speech and dissemination of news have also to be considered. On such grounds, no doubt, a legal right of privacy which fully secures this interest has not been recognized anywhere.[63] For the most part the interest has been secured incidentally, as it were, by taking account of infringement thereof as an element of damage where well-recognized legal rights have also been violated, rather than by establishing a legal right of privacy a violation whereof should constitute a cause of action. But while the law is slow in recognizing this interest as something to be secured in and of itself, it would seem that the aggressions of a type of unscrupulous journalism, the invasions of privacy by reporters in competition for a "story," the activities of photographers, and the temptation to advertisers to sacrifice private feelings to their individual gain call upon the law to do more in the attempt to secure this interest than merely take incidental account of infringements of it.[64] A man's feelings are as much a part of his personality as his

[63] See Wigmore, Summary of the Principles of Torts, § 149.

[64] "John S. Geraghty, *father* of John Edward Paul Geraghty, who on Tuesday eloped with Miss Julia French, to-day asked the police to save him from camera men. . . . Geraghty told the police that he was followed everywhere by men with cameras who were trying to take the picture of himself and his cab. He said he had been driven about crazy by them and that his wife and children were being hounded in a similar way. Mr. Geraghty was very angry this afternoon and he loaded up the front seat of his cab with several large stones which, he said, the first man who tried to snap his picture would get. Mr. Geraghty is usually a peaceful, law-abiding citizen, but there arrived here to-day a number of men to get his picture, and he seriously resents being followed." Press dispatch of August 12, 1911, quoted in Wigmore, Cases on Torts, II, 960–961. *Cf.* Binns *v.* The Vitagraph Co., 210 N. Y. 51, 103 N. E. 1108 (1913).

limbs.[65] The actions that protect the latter from injury may well be made to protect the former by the ordinary process of legal growth. The problems are rather to devise suitable redress and to limit the right in view of other interests involved.

The interest in body and life is not only the first to receive the protection of law, but it is on the whole the interest with respect to which individual demands are most insistent and the social interest in securing them is strongest. Yet the law, as has been seen, does not cover the whole field of this interest. It does not secure all the demands with respect to physical and mental integrity which the individual may make. The reasons are of two kinds. On the one hand they are historical, growing out of the mode in which the law upon this subject has developed, and in particular out of the procedure and the remedies worked out to give effect thereto. For example, a large part of the backwardness of the common law as to immunity of the mind and of the nervous system from injury is due to the exigencies of our mode of trial by jury and to our remedy of damages. Such a remedy as that afforded by the action for honorable amends[66] in the civil law and resort to specific relief where possible, as is done in continental Europe,[67] would enable the legal system to extend the scope of its protection of this interest. But the most effective remedy in this connection is prevention. The backwardness of preventive justice in American law is a grave defect.[68] In connection with interests of personality, where redress by way of damages is often obviously inadequate if not inapplicable, the hesitation of our law to apply preventive remedies is unfortunate and without just excuse.[69]

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[65] Some think of the right of privacy as a "property right," that is, they consider that an interest of substance is involved. Munden *v.* Harris, 153 Mo. App. 652, 134 S. W. 1076 (1911). But see Riddle *v.* MacFadden, 201 N. Y. 215, 94 N. E. 644 (1911).

[66] See De Villiers, The Roman and Roman Dutch Law of Injuries, 177 ff.

[67] Garraud, Droit pénal français, II, §§ 459–461; IV, §§ 1324 ff.

[68] See my paper, A Practical Program of Procedural Reform, 22 Green Bag 455.

[69] "There is no reason in the nature of things why equity should not interfere to prevent injury to feelings. Pecuniary damages cannot be proved, and the temptation to purely speculative litigation is therefore absent. Such being the case, if a plaintiff feels himself so much aggrieved by threatened or continued acts of the defendant as to lead him to incur the expense and annoyance of an actual litigation, we may be certain that he regards the injury as substantial. If under these circumstances he

A second type of reasons for the failure of the law to secure fully individual interests of personality are practical, growing out of the practical limitations involved in the administration of justice according to law. Next to property in corporeal things, the interest in body and life is on the whole the interest most completely capable of legal protection. But the practical limitations are considerable. In the first place, with respect to merely mental injuries, the danger of imposture, the difficulty, if not impossibility, of satisfactory proof, and the difficulty of devising adequate redress stand in the way of complete securing by law of an interest which the law is quite willing to recognize fully. Again, account must be taken of the relative triviality of injuries, looked at in gross, which may nevertheless have a real importance in the case of particular individuals. The necessity of acting with reference to the average case, involved in any system of standards or rules, compels some sacrifice of the demands of the over-sensitive. Finally, the intangible nature of many injuries to personality, the difficulty of tracing them to their source and of fitting cause to effect, must also be taken into account.

[To be concluded]

Roscoe Pound.

HARVARD LAW SCHOOL.

can, in fact, prove that continued injury to his feelings is threatened or continued, and the defendant can offer no rational excuse for continuing it, equity has no rational excuse to offer for denying the easy aid of its injunctive process." Abbot, Justice and the Modern Law, 32.

Article

The Two Western Cultures of Privacy: Dignity Versus Liberty

James Q. Whitman†

CONTENTS

† Ford Foundation Professor of Comparative and Foreign Law, Yale University. Earlier versions of this paper were presented to the helpful audiences at the Unidem Seminar on European and American Constitutionalism, the Institut des Hautes Études sur la Justice, the French-American Foundation of Paris, and Columbia and Yale Law Schools. The author would also like to thank Anita Allen, Friedrich Wenzel Bulst, Agnès Dunogué, Edward Eberle, William Edmundson, Christoph Paulus, and Jeffrey Rosen for their aid and advice. Unless otherwise noted, all translations are my own.

I. A TRANSATLANTIC CLASH

In every corner of the Western world, writers proclaim "privacy" as a supremely important human good, as a value somehow at the core of what makes life worth living. Without our privacy, we lose "our very integrity as persons," Charles Fried declared over thirty-five years ago.[1] Many others have since agreed that privacy is somehow fundamental to our "personhood."[2] It is a commonplace, moreover, that our privacy is peculiarly menaced by the evolution of modern society, with its burgeoning technologies of surveillance and inquiry. Commentators paint this menace in very dark colors: Invasions of our privacy are said to portend a society of "horror,"[3] to "injure [us] in [our] very humanity,"[4] or even to threaten "totalitarianism,"[5] and the establishment of law protecting privacy is accordingly declared to be a matter of fundamental rights.[6] It is the rare privacy advocate who resists citing Orwell when describing these dangers.

At the same time, honest advocates of privacy protections are forced to admit that the concept of privacy is embarrassingly difficult to define.[7] "[N]obody," writes Judith Jarvis Thomson dryly, "seems to have any very clear idea what [it] is."[8] Not every author is as skeptical as Thomson, but many of them feel obliged to concede that privacy, fundamentally important though it may be, is an unusually slippery concept. In particular, the sense of what must be kept "private," of what must be hidden before the eyes of others, seems to differ strangely from society to society. This is a point that is frequently made by citing the literature of ethnography, which tells us that there are some societies in which people cheerfully defecate in full view of others, and at least a few in which the same is true of having

1. Charles Fried, *Privacy*, 77 YALE L.J. 475, 477 (1968).

2. *See, e.g.*, Jeffrey H. Reiman, *Privacy, Intimacy, and Personhood*, *in* PHILOSOPHICAL DIMENSIONS OF PRIVACY: AN ANTHOLOGY 300, 310 (Ferdinand David Schoeman ed., 1984). For a more recent example of this widespread idea, see Jonathan Kahn, *Privacy as a Legal Principle of Identity Maintenance*, 33 SETON HALL L. REV. 371 (2003). *Cf.* Hugh Miller, III, *DNA Blueprints, Personhood, and Genetic Privacy*, 8 HEALTH MATRIX 179 (1998). There are of course other approaches, and in particular more skeptical ones, such as those offered by some feminists. *See, e.g.*, Sally F. Goldfarb, *Violence Against Women and the Persistence of Privacy*, 61 OHIO ST. L.J. 1 (2000).

3. Edward J. Eberle, *The Right to Information Self-Determination*, 2001 UTAH L. REV. 965, 995.

4. Fried, *supra* note 1, at 475.

5. Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 784 (1989).

6. See especially the recent Charter of Fundamental Rights of the European Union, arts. 7-8, 2000 O.J. (C 364) 1, 10.

7. *See, e.g.*, Willam M. Beaney, *The Right to Privacy and American Law*, 31 LAW & CONTEMP. PROBS. 253, 255 (1966); Robert C. Post, *Three Concepts of Privacy*, 89 GEO. L.J. 2087 (2001).

8. Judith Jarvis Thomson, *The Right to Privacy*, *in* PHILOSOPHICAL DIMENSIONS OF PRIVACY: AN ANTHOLOGY, *supra* note 2, at 272, 286; *see also, e.g.*, JEAN L. COHEN, REGULATING INTIMACY: A NEW LEGAL PARADIGM 56 (2002).

sex.[9] But the same point can be made by citing a large historical literature, which shows how remarkably ideas of privacy have shifted and mutated over time.[10] Anyone who wants a vivid example can visit the ruins of Ephesus, where the modern tourist can set himself down on one of numerous ancient toilet seats in a public hall where well-to-do Ephesians gathered to commune, two thousand years ago, as they collectively emptied their bowels.[11]

If privacy is a universal human need that gives rise to a fundamental human right, why does it take such disconcertingly diverse forms? This is a hard problem for privacy advocates who want to talk about the values of "personhood," harder than they typically acknowledge. It is a hard problem because of the way they usually try to make their case: Overwhelmingly, privacy advocates rely on what moral philosophers call "intuitionist" arguments.[12] In their crude form, these sorts of arguments suppose that human beings have a direct, intuitive grasp of right and wrong—an intuitive grasp that can guide us in our ordinary ethical decisionmaking. Privacy advocates evidently suppose the same thing. Thus, the typical privacy article rests its case precisely on an appeal to its reader's intuitions and anxieties about the evils of privacy violations. Imagine invasions of your privacy, the argument runs. Do they not seem like violations of your very personhood? Since violations of privacy seem intuitively horrible to everybody, the argument continues, safeguarding privacy must be a legal imperative, just as safeguarding property or contract is a legal imperative. Indeed, privacy matters so much to us that laws protecting it must be a basic element of human rights.

This kind of argument can certainly make a powerful impression on first reading, since it is true that we can all imagine *some* violation of our privacy that seems very horrible. This is especially so when the writings in question are composed by scholars with a real literary gift, like Fried.

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9. Alan Westin, *The Origins of Modern Claims to Privacy*, *in* PHILOSOPHICAL DIMENSIONS OF PRIVACY: AN ANTHOLOGY, *supra* note 2, at 56, 62-63. For unconvincing doubts about the existence of public defecation, see BARRINGTON MOORE, JR., PRIVACY: STUDIES IN SOCIAL AND CULTURAL HISTORY 59-65 (1984).

10. *See, e.g.*, ANDRÉ BERTRAND, DROIT À LA VIE PRIVÉE ET DROIT À L'IMAGE 2 (1999) (discussing public defecation by early modern kings of France (citing JEAN CLAUDE BOLOGNE, HISTOIRE DE LA PUDEUR 168 (1986))); Bernard Beignier, *La vie privée*, *in* LIBERTÉS ET DROITS FONDAMENTAUX 139, 139-41 (Rémy Cabrillac et al. eds., 5th ed. 1999) (discussing nude bathing in the Seine and other early modern examples). For some doubts about the prevalence of public nudity in the premodern world, see 1 HANS PETER DUERR, DER MYTHOS VOM ZIVILISATIONSPROZESS 59-72 (1988).

11. For a discussion of communal defecation in Greco-Roman antiquity, governed by some complex social and even legal rules, see RICHARD NEUDECKER, DIE PRACHT DER LATRINE: ZUM WANDEL ÖFFENTLICHER BEDÜRFNISANSTALTEN IN DER KAISERZEITLICHEN STADT 24-39 (1994). For a discussion of Ephesus in particular, with emphasis on the posh setting, see *id.* at 126-31. For a tourist guide, see EPHESOS: DER NEUE FÜHRER 122 (Peter Scherrer ed., 1995).

12. This argument was classically offered in W.D. ROSS, THE RIGHT AND THE GOOD, at ix, xiii (Philip Stratton-Lake ed., Clarendon Press 2002) (1930).

Nevertheless, no matter how anxiety-inducing it may be to read these authors, their arguments only carry real weight if it is true that the intuitions they evoke are shared by all human beings. Yet all the evidence seems to suggest that human intuitions and anxieties about privacy differ. We do not need to refer to the practices of exotic ancient or modern cultures to demonstrate as much: It is true even as between the familiar societies of the modern West. In fact, we are in the midst of significant privacy conflicts between the United States and the countries of Western Europe—conflicts that reflect unmistakable differences in sensibilities about what ought to be kept "private."

To the Europeans, indeed, it often seems obvious that Americans do not understand the imperative demands of privacy at all. The Monica Lewinsky investigation, in particular, with its numerous and lewd disclosures, led many Europeans to that conclusion.[13] But the Lewinsky business is not the only example: There are plenty of other aspects of American life that seem to Europeans to prove the same thing. Let me offer a variety of examples from France and Germany, two countries that have been my focus in recent research, and that are my focus in this Article as well.[14] Some of the things that bother French and German observers involve what Americans will think of as trivialities of everyday behavior. For example, visitors from both countries are taken aback by the ill-bred way in which Americans talk about themselves. As a French article warns visitors to the United States, America is a place where strangers suddenly share information with you about their "private activities" in a way that is "difficult to imagine" for northern Europeans or Asians.[15] Americans have a particularly embarrassing habit, continental Europeans believe, of talking about salaries. It is "normal in America," an Internet site informs German tourists, for your host at dinner to ask "not just how much you earn, but even what your net worth is"[16]—topics ordinarily quite off-limits under the rules of European

13. *E.g.*, Jacques Lassaussois, *Procès Clinton: Où va la Justice Américaine?*, GAZ. PAL., Mar. 18-19, 1998, at 14 (noting that the complaint against Clinton involved "la vie privée"); Nicolas Weil, *Le recours à l'intimité est de règle aux Etats-Unis*, LE MONDE, Apr. 22, 2002, LEXIS, Nexis Library, Le Monde File.

14. When this Article discusses Germany during the period between World War II and reunification, it refers to West Germany unless otherwise indicated.

15. Gilles Asselin, *Du mythe à la réalité des différences culturelles*, FRANCE-AMERIQUE, Jan. 23-29, 1999, http://www.sococo.com/french4.htm ("Cette scène si typiquement américaine où des 'étrangers' *(strangers)* s'assemblent pour quelques instants et échangent rapidement des informations concernant leurs activités privées est difficile à imaginer en Asie ou dans bien d'autres pays d'Europe non méditerranéenne.").

16. Tipps für Unterwegs: USA, Essen und Trimken, *at* http://freenet.de/freenet/reisen/ratgeber/unterwegs/knigge/usa.html (last visited Dec. 4, 2003) ("Wundern Sie sich nicht über Fragen nach Ihrem Einkommen oder sogar Vermögen, das ist in den USA normal."); *see also* FLORENCE LE BRAS, LE GUIDE DU SAVOIR-VIVRE 301 (1999) (noting that in America, "[n]e vous choquez pas si l'on vous demande le montant de vos revenus à la première rencontre"); Mitteldeutscher Rundfunk, Urlaubs-Knigge: Großbritannien, USA, *at* http://www.mdr.de/hier-ab-vier/rat_und_tat/3617.html (last visited Dec. 4, 2003) ("Mit dem Thema Geld hingegen

etiquette.[17] Talking about salaries is not quite like defecating in public, but it can seem very off-putting to many Europeans nevertheless.

But it is not just a matter of the boorish American lack of privacy etiquette. It is also a matter of American law. Continental law is avidly protective of many kinds of "privacy" in many realms of life, whether the issue is consumer data,[18] credit reporting,[19] workplace privacy,[20] discovery in civil litigation,[21] the dissemination of nude images on the Internet,[22] or shielding criminal offenders from public exposure.[23] To people accustomed to the continental way of doing things, American law seems to tolerate relentless and brutal violations of privacy in all these areas of law. I have seen Europeans grow visibly angry, for example, when they learn about routine American practices like credit reporting. How, they ask, can merchants be permitted access to the entire credit history of customers who have never defaulted on their debts? Is it not obvious that this is a violation of privacy and personhood, which must be prohibited by law?

These are clashes in attitude that go well beyond the occasional social misunderstanding. In fact, they have provoked some tense and costly transatlantic legal and trade battles over the last decade and a half. Thus, the European Union and the United States slid into a major trade conflict over the protection of consumer data in the 1990s, only problematically resolved by a 2000 "safe harbor" agreement.[24] Europeans still constantly complain that Americans do not accept the importance of protecting consumer privacy.[25] Those tensions have only grown in the aftermath of September 11.[26] Something similar has happened with regard to discovery in civil

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wird locker umgegangen. Wundern Sie sich daher nicht, wenn man Sie nach Ihrem Einkommen fragt.").

17. *E.g.*, SABINE DENUELLE, LE SAVOIR-VIVRE: GUIDE DES RÈGLES ET DES USAGES D'AUJOURD'HUI 165 (1999); LE BRAS, *supra* note 16, at 66.

18. *See infra* notes 185-190 and accompanying text.

19. *See infra* notes 181-183 and accompanying text.

20. *See infra* notes 196-199 and accompanying text.

21. *See infra* note 27 and accompanying text.

22. *See infra* notes 218-233 and accompanying text.

23. *See infra* notes 202-205 and accompanying text.

24. At stake was the Council Directive 95/46 of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 1995 O.J. (L 281) 31 [hereinafter Data Privacy Directive]. For further discussion, see Symposium, *Data Protection Law and the European Union's Directive: The Challenge for the United States*, 80 IOWA L. REV. 431 (1995). For documents on the Safe Harbor Agreement, see DANIEL J. SOLOVE & MARC ROTENBERG, INFORMATION PRIVACY LAW 743-54 (2003). For the Safe Harbor Privacy Principles themselves, see Issuance of Safe Harbor Principles and Transmission to European Commission, 65 Fed. Reg. 45,666 (July 24, 2000).

25. *E.g.*, Steven R. Salbu, *The European Union Data Privacy Directive and International Relations*, 35 VAND. J. TRANSNAT'L L. 655, 684 (2002); David Scheer, *Europe's New High-Tech Role: Playing Privacy Cop to the World*, WALL ST. J., Oct. 10, 2003, at A1.

26. *E.g.*, Peter Gola & Christoph Klug, *Die Entwicklung des Datenschutzrechts in den Jahren 2001/2002*, 55 NEUE JURISTISCHE WOCHENSCHRIFT [N.J.W.] 2431, 2431-32 (2002); Adam Clymer, *Privacy Concerns: Canadian and Dutch Officials Warn of Security's Side Effects*, N.Y. TIMES, Feb. 28, 2003, at A14; Scheer, *supra* note 25.

procedure: American law allows parties to rummage around in each other's records in a way that seems obnoxious and manifestly unacceptable to Europeans. The result, in recent decades, has been a seething little war over discovery.[27] The circulation of the nude photos of celebrities on the Internet has produced another such conflict, with Europeans acting alone to penalize Internet service providers.[28]

For sensitive Europeans, indeed, a tour through American law may be an experience something like a visit to the latrines of Ephesus. Correspondingly, it has become common for Europeans to maintain that they respect a "fundamental right to privacy" that is either weak or wholly absent in the "cultural context" of the United States.[29] Here, Europeans point with pride to Article 8 of the European Convention on Human Rights, which protects "the right to respect for private and family life,"[30] and to the European Union's new Charter of Fundamental Rights, which demonstratively features articles on both "Respect for Private and Family Life" and "Protection of Personal Data."[31] By the standards of those great documents, American privacy law seems, from the European point of view, simply to have "failed."[32]

But it is not just that Europeans resent and distrust the American approach to privacy: The reverse is also true. Anyone who has lived in the United States knows that Americans can be just as obsessively attached to their "privacy" as Europeans, sometimes defending it by resort to firearms.

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27. David J. Gerber, *International Discovery After* Aerospatiale*: The Quest for an Analytical Framework*, 82 AM. J. INT'L L. 521 (1988); Abbo Junker, *Der Justizkonflikt mit den USA*, 26 BETRIEBS-BERATER 1752 (1987); Christoph Paulus, *Discovery, Deutsches Recht und das Haager Beweisübereinkommen*, 104 ZEITSCHRIFT FÜR ZIVILPROZESS 397 (1991).

28. *See infra* notes 218-233 and accompanying text.

29. Martine Bourrie-Quenillet & Florence Rodhain, *L'Utilisation de la messagerie electronique dans l'entreprise. Aspects juridiques et managériaux en France et aux Etats-Unis*, LA SEMAINE JURIDIQUE EDITION GENERALE [JCP], Jan. 9, 2002, nn.14-15, LEXIS, Nexis Library, La Semaine Juridique, édition générale File. For a German example, see Jürgen von Gerlach, *Der Schutz der Privatsphäre von Personen des öffentlichen Lebens in rechtsvergleichender Sicht*, 15/16 JURISTENZEITUNG 741, 753 (1998). For a description of the European sense that the new Charter of Fundamental Rights sets Europe apart from the United States, see Ken Gormley, *Long Live the Constitution (Subject to Change)*, PITTSBURGH POST-GAZETTE, Nov. 17, 2002, at F1.

30. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 8, para. 1, 213 U.N.T.S. 221, 230 (entered into force Sept. 3, 1953). For an example of the pride and bemusement occasioned by English differences, see Chrisje Brants, *The State and the Nation's Bedrooms: The Fundamental Right of Sexual Autonomy*, *in* PERSONAL AUTONOMY, THE PRIVATE SPHERE AND THE CRIMINAL LAW 117, 117 (Peter Alldridge & Chrisje Brants eds., 2001). *See also* Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data, Jan. 28, 1981, Europ. T.S. No. 108 (entered into force Oct. 1, 1985); *Universal Declaration of Human Rights*, art. 12, G.A. Res. 217 (III)A, U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (1948).

31. Charter of Fundamental Rights of the European Union, *supra* note 6, arts. 7-8, 2000 O.J. (C 364) at 10.

32. *See* David A. Anderson, *The Failure of American Privacy Law*, *in* PROTECTING PRIVACY 139 (Basil S. Markesinis ed., 1999).

As for American law, it too is obsessed with privacy. Indeed, some of the most violently controversial American social issues are conceived of as privacy matters. This has been true of abortion for thirty years.[33] With the Supreme Court's decision in *Lawrence v. Texas*, it is now true of homosexuality as well.[34] It is simply false to say that privacy doesn't matter to Americans.

In fact, let us make no mistake about it: When it comes to privacy, there are plenty of *European* practices that seem intuitively objectionable to *Americans*. Some of these have to do with seemingly minor aspects of the anthropology of everyday life, most especially involving nudity. If the Europeans are puzzled by the ill-bred way in which Americans casually talk about themselves, Americans are puzzled by the ill-bred way in which Europeans casually take off their clothes. Phenomena like public nudity in the parks of German cities are particularly baffling to Americans, but so are phenomena like the presence of female attendants in men's washrooms. It is genital nudity that Americans find most bizarre: One's genitalia are "privates" in the full sense of the word in America, and one does not ordinarily expose them in public, and certainly not before the opposite sex. Even breasts are supposed to be kept covered in the United States—as the occasional female European tourist has discovered, when arrested (or even jailed!) for sunbathing topless on an American beach. ("Those Americans are Out of their Minds!" howls a headline from a Swiss tabloid reporting one such incident from Florida.)[35] Even American advertising, which doesn't stop at much, doesn't show bare breasts.

Public nudity may seem little more than a curiosity (though we shall see that it raises revealing problems in the European law of privacy). But here again, it is not just a matter of norms of everyday behavior; it is a matter of law. There are numerous aspects of European law that can seem not only ridiculous, but somewhat shocking to Americans. For example, continental governments assert the authority to decide what names parents will be permitted to give their children—a practice affirmed by the European Court of Human Rights as recently as 1996.[36] This is an application of state power that Americans will view with complete astonishment, as a manifest violation of proper norms of the protection of privacy and personhood. How can the state tell you what you are allowed to call your baby? Nor does it end there: In Germany, everybody must be formally registered with the police at all times.[37] In both Germany and

33. *See* Roe v. Wade, 410 U.S. 113 (1973).

34. 123 S. Ct. 2472 (2003).

35. Claude Bühler, *Die spinnen, die Amerikaner! Blutter Busen. Schweizerinnen Verhaftet!*, BLICK ONLINE, Apr. 5, 2000 (on file with author).

36. *See infra* notes 321-330 and accompanying text.

37. Melderechtsrahmengesetz (MRRG), v. 24.6.1994 (BGBl. I S.1302).

France, inspectors have the power to arrive at your door to investigate whether you have an unlicensed television.[38] Evidence that Americans would regard as illegally seized is routinely considered in continental adjudication.[39] In France and Germany, according to a recent study, telephones are tapped at ten to thirty times the rate they are tapped in the United States—and in the Netherlands and Italy, at 130 to 150 times the rate.[40] All of this will make many an American snigger at the claim that Europeans have a superior grasp of privacy. What kind of "privacy" is there, Americans will ask, in countries where people prance around naked out of doors while allowing the state to keep tabs on their whereabouts, convict them on the basis of unfair police investigations, peer into their living rooms, tap their phones, and even dictate what names they can give to their babies?

Evidently, Americans and continental Europeans perceive privacy differently. Privacy advocates sometimes try to downplay these differences. The felt need for privacy, they insist, is in fact universal, and the only real difference is that American protections are the product of piecemeal legislation, less systematically developed than European protections as yet, but nevertheless evolving in a European direction.[41] There is certainly some truth in this: There are indeed important resemblances between the systems on either side of the Atlantic. Any proper account of comparative privacy law will have to explain many similarities as well as many differences.

Nevertheless, when all is said and done, it is impossible to ignore the fact that Americans and Europeans are, as the Americans would put it,

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38. In Germany, this is governed by the Rundfunkgebührenstaatsvertrag (RgebStV), v. 31.8.1991, zuletzt geändert durch Artikel 5 des Fünften Staatsvertrages zur Änderung rundfunkrechtlicher Staatsverträge v. 6.7.2000-7.8.2000 (GVBl. Berlin, S.447). For a popular website discussion of the powers of German inspectors, see Fragen und Antworten, http://www.gezneindanke.de/faq.htm (last visited Nov. 5, 2003). For France, see Decree No. 92-304 of Mar. 30, 1992, http://www.legifrance.gouv.fr/texteconsolide/FBHAD.htm; and STÉPHANE NERRANT, LA MISE HORS D'USAGE DU TÉLÉVISEUR ET L'EXIGIBILITÉ DE LA REDEVANCE DE L'AUDIOVISUEL (2000).

39. For an authoritative assessment of the state of the differences, see MIRJAN R. DAMAŠKA, EVIDENCE LAW ADRIFT 13-14, 23-24 (1997).

40. HANS-JÖRG ALBRECHT ET AL., RECHTSWIRKLICHKEIT UND EFFIZIENZ DER ÜBERWACHUNG DER TELEKOMMUNIKATION NACH DEN §§ 100A, 100B STPO UND ANDERER VERDECKTER ERMITTLUNGSMAßNAHMEN 7 (2003), http://www.bmj.bund.de/images/11600.pdf. For an article conceding that German law is theoretically more permissive but doubting that any empirical conclusions can be drawn, see Paul M. Schwartz, *German and U.S. Telecommunications Privacy Law: Legal Regulation of Domestic Law Enforcement Surveillance*, 54 HASTINGS L.J. 751 (2003).

41. *See, e.g.*, SOLOVE & ROTENBERG, *supra* note 24, at 58; Joel R. Reidenberg, *Setting Standards for Fair Information Practice in the U.S. Private Sector*, 80 IOWA L. REV. 497 (1995). For emphasis on the piecemeal character of American law in an essay by an eminent comparatist skeptical of the future of European-style protections in the United States, see Hein Kötz, *Der zivilrechtliche Persönlichkeitsschutz im anglo-amerikanischen Rechtskreis*, *in* DAS PERSÖNLICHKEITSRECHT IM SPANNUNGSFELD ZWISCHEN INFORMATIONSAUFTRAG UND MENSCHENWÜRDE 97, 104-05 (Heinz Hübner et al. eds., 1989).

coming from different places. At least as far as the law goes, we do not seem to possess general "human" intuitions about the "horror" of privacy violations. We possess something more complicated than that: We possess American intuitions—or, as the case may be, Dutch, Italian, French, or German intuitions. We must make some effort to explain this fact before we start proclaiming universal norms of privacy protection. In particular, we will not do justice to our transatlantic conflicts if we begin by declaring that American privacy law has "failed" while European privacy law has "succeeded." That is hogwash. What we must acknowledge, instead, is that there are, on the two sides of the Atlantic, two different cultures of privacy, which are home to different intuitive sensibilities, and which have produced two significantly different laws of privacy.

II. DIGNITY VERSUS LIBERTY

So why do these sensibilities differ? Why is it that French people won't talk about their salaries, but will take off their bikini tops? Why is it that Americans comply with court discovery orders that open essentially all of their documents for inspection, but refuse to carry identity cards? Why is it that Europeans tolerate state meddling in their choice of baby names? Why is it that Americans submit to extensive credit reporting without rebelling?

These are not questions we can answer by assuming that all human beings share the same raw intuitions about privacy. We do not have the same intuitions, as anybody who has lived in more than one country ought to know. What we typically have is something else: We have intuitions that are shaped by the prevailing legal and social values of the societies in which we live. In particular, we have, if I may use a clumsy phrase, *juridified* intuitions—intuitions that reflect our knowledge of, and commitment to, the basic legal values of our culture.

Indeed, to get a handle on our transatlantic privacy conflicts, we must begin by recognizing that continental European and American sensibilities about privacy grow out of much larger and much older differences over basic legal values, rooted in much larger and much older differences in social and political traditions. The fundamental contrast, in my view, is not difficult to identify. In one form or another, it is a contrast that has been noticed by observers of the transatlantic scene for a century.[42] It is the

42. *See* BERNARD BEIGNIER, LE DROIT DE LA PERSONNALITÉ 60-61 (1992) (contrasting the French focus on dignity with the characteristically American focus on liberty); EDWARD J. EBERLE, DIGNITY AND LIBERTY: CONSTITUTIONAL VISIONS IN GERMANY AND THE UNITED STATES 6-7 (2002); J. KOHLER, DAS EIGENBILD IM RECHT 7 (1903) (noting that the American "right of privacy" is a mere right to remain hidden, which is inadequate); *id.* at 17 (explaining that the correct German view is that one's image must be protected against "tasteless, insulting or degrading" appropriation or exposure); FRANÇOIS RIGAUX, LA PROTECTION DE LA VIE PRIVÉE ET DES AUTRES BIENS DE LA PERSONNALITÉ 698 (1990) (noting the absence of concern with honor in

contrast between two conceptions of privacy most recently distinguished by Robert Post: between privacy as an aspect of dignity and privacy as an aspect of liberty.[43]

Continental privacy protections are, at their core, a form of protection of a right to *respect* and *personal dignity*. The core continental privacy rights are *rights to one's image, name, and reputation*,[44] and what Germans call the *right to informational self-determination*—the right to control the sorts of information disclosed about oneself.[45] These are closely linked forms of the same basic right: They are all rights to control your public image—rights to guarantee that people see you the way you want to be seen. They are, as it were, rights to be shielded against unwanted public exposure—to be spared embarrassment or humiliation. The prime enemy of our privacy, according to this continental conception, is the media, which always threatens to broadcast unsavory information about us in ways that endanger our public dignity. But of course, this concern does not end with media exposure. Any other agent that gathers and disseminates information can also pose such dangers. In its focus on shielding us from public indignity, the continental conception is typical of the continental legal world much more broadly: On the Continent, the protection of personal dignity has been a consuming concern for many generations.

By contrast, America, in this as in so many things, is much more oriented toward values of liberty, and especially liberty against the state. At its conceptual core, the American right to privacy still takes much the form that it took in the eighteenth century: It is the right to freedom from intrusions by the state, especially in one's own home.[46] The prime danger,

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American law). The relative absence of honor-oriented dignity in America has also been noted by Jeffrey Rosen, in passages citing my own earlier work. Jeffrey Rosen, *The Purposes of Privacy: A Response*, 89 GEO. L.J. 2117, 2125-27 & nn.21-22 (2001) (citing James Q. Whitman, *Enforcing Civility and Respect: Three Societies*, 109 YALE L.J. 1279, 1293, 1307-09 (2000)).

43. These are two of the three concepts identified in Post, *supra* note 7, at 2087.

44. European scholars sometimes treat the right to one's image and the right to privacy as different, if always closely related, interests. This is particularly because of the issues raised by commercialization of one's image. *See, e.g.*, Florence Bouvard, *La Commercialisation de l'Image de la Personne Physique*, *in* IMAGE ET DROIT 375, 380-84 (Pascale Bloch ed., 2002). Nevertheless, French jurisprudence tends to see it differently. *See, e.g.*, Isabelle de Lamberterie & Xavier Strubel, *L'Image Manipulée*, *in* IMAGE ET DROIT, *supra*, at 335, 349-50 (stating that today, manipulation of a person's image is a subject of privacy law). And indeed, the spirit of both bodies of law is much the same. It is justifiable to treat them as, at core, a single body of law, concerned in all of its aspects with the public image.

For the codification of the relevant German law, see §§ 22-23 KUNSTURHEBERGESETZ [KUG] (amended 2001). For detailed discussion on the current state of German law, see URHEBERRECHT KOMMENTAR 926 (Gerhard Schricker ed., 1999).

45. For detailed discussion of this point, see EBERLE, *supra* note 42, at 87-92. For the general outlines of the German right, see § 823, at 61 BÜRGERLICHES GESETZBUCH [BGB] (Otto Mühl & Walther Hadding eds., 1998) (commentary by Zeuner).

46. For the commonplace view that this is the origin of the American right to privacy, see, for example, JEFFREY ROSEN, THE UNWANTED GAZE: THE DESTRUCTION OF PRIVACY IN AMERICA 5 (2000).

from the American point of view, is that "the sanctity of [our] home[s]," in the words of a leading nineteenth-century Supreme Court opinion on privacy, will be breached by government actors.[47] American anxieties thus focus comparatively little on the media. Instead, they tend to be anxieties about maintaining a kind of private sovereignty within our own walls.

Such is the contrast that lies at the base of our divergent sensibilities about what counts as a "privacy" violation. On the one hand, we have an Old World in which it seems fundamentally important not to lose public face; on the other, a New World in which it seems fundamentally important to preserve the home as a citadel of individual sovereignty. What Europeans miss in Americans is a sense of the demands of public face; indeed, Europeans have been denouncing American law on that ground since at least 1903.[48] When Americans seem to continental Europeans to violate norms of privacy, it is because they seem to display an embarrassing lack of concern for public dignity—whether the issue is the public indignity inflicted upon Monica Lewinsky by the media, or the self-inflicted indignity of an American who boasts about his salary. Conversely, when continental Europeans seem to Americans to violate norms of privacy, it is because they seem to show a supine lack of resistance to invasions of the realm of private sovereignty whose main citadel is the home—whether the issue is wiretapping or baby names. The question of public nudity presents the contrast in piquant form. To the continental way of seeing things, what matters is the right to control your public image—and that right may include the right to present yourself proudly nude, if you so choose. To the American mind, by contrast, what matters is sovereignty within one's own home; and people who have shucked the protection of clothing are like people who have shucked the protection of the walls of their homes, only more so. They are people who have surrendered any "reasonable expectation of privacy."[49]

Now, let me emphasize that this contrast is not absolute. These are complex societies, which are home to a variety of sensibilities, concerns, traditions, and mutual influences. There are certainly some Americans who find the European idea of dignity appealing. This is notably true of Justice Kennedy, whose opinion for the Court in *Lawrence v. Texas* expresses admiration for European approaches, and who tries energetically to found his opinion on ideals of both liberty and dignity.[50] For that matter, there are no doubt Europeans who find the characteristic American approach appealing. Moreover, it is certainly the case that both forms of the protection of privacy are in force to some extent on both sides of the

47. Boyd v. United States, 116 U.S. 616, 630 (1886).
48. *See* KOHLER, *supra* note 42, at 7.
49. *See infra* notes 240-242 and accompanying text.
50. *See* 123 S. Ct. 2472, 2483 (2003) (Kennedy, J.).

Atlantic: There are some protections against the media and the like in the United States, and there are certainly some American tort cases protecting people's public image.[51] As for Europe: There are certainly some quite far-reaching protections against the state there, and there is certainly law protecting people within the bounds of the home.[52]

So it would be wrong to say that there is some absolute difference between American and continental European law. But the issue is not whether there is an absolute difference. Comparative law is the study of *relative* differences. Indeed, it is the great methodological advantage of comparative law that it can explore relative differences. No absolute generalization about any legal system is ever true. It would be false, for example, to say that American law is hostile to the social welfare state: It is easy to think of exceptions to that generalization. But what *is* true is that American law is *more* hostile to the social welfare state than continental law—and that is a statement that is not only true, but highly important to understanding the world in which we live.

In comparative privacy law, too, it is the relative differences that matter. Americans and Europeans certainly do sometimes arrive at the same conclusions. Nevertheless, they have different starting points and different ultimate understandings of what counts as a just society. If I may use a cosmological metaphor: American privacy law is a body caught in the gravitational orbit of liberty values, while European law is caught in the orbit of dignity. There are certainly times when the two bodies of law approach each other more or less nearly. Yet they are consistently pulled in different directions, and the consequence is that these two legal orders really do meaningfully differ: Continental Europeans are consistently more drawn to problems touching on public dignity, while Americans are consistently more drawn to problems touching on the depredations of the state. Indeed, as our many transatlantic conflicts suggest, the distances between us can often stretch into the unbridgeable.

It should be obvious enough that this is not a contrast that we can understand by reflecting on the supposed universal intuitive imperatives of "personhood," or of "the integrity of the person." One's sense of personhood can be grounded just as much in an attachment to liberty as in an attachment to dignity. Maybe Europeans feel that their personhood is confirmed by the fact that their bosses are obliged to respect their privacy in the workplace, or by the fact that they can freely strip and sun themselves in central Berlin. That does not prevent Americans from feeling that *their* personhood is confirmed when they sit at home, a shotgun across their knees, determined to resist taxation.

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51. *See infra* notes 243-257 and accompanying text.
52. *See* Brants, *supra* note 30.

No, the issue is not that one side of the Atlantic has discovered true "personhood," while the other lags behind. Something else is going on. The only way to think straight about these differences is to reflect on the core social values of dignity or liberty. The comparative law of privacy is not about the intuitive preconditions of personhood, but about contrasting political and social ideals. In the United States those political and social ideals revolve, as they have for generations, primarily around our suspicions of the police and other officials, while on the Continent they revolve unmistakably around one's position in society, one's "dignity" and "honor."

Such is the contrast this Article explores. Its focus is primarily on the Continent, whose world is too little known among Americans, with only an abbreviated sketch of American law. But I hope that even a sketch of American law will stand out in much bolder and more revealing relief when placed against the continental background.

III. THE EUROPEAN TRADITION OF DIGNITY: LEVELING UP

The political and social values of "dignity" and "honor" are indeed what is at stake in the continental concept of privacy, in ways that we can only understand if we dig deeply into continental traditions. That is what I propose to do in the next few Parts of this Article, focusing, as I have done in a series of related publications, on Germany and France, the two dominant legal traditions of the Continent. Here I must begin by summarizing work I have published on a variety of aspects of European "dignity."

Where do the peculiar continental anxieties about "privacy" come from? To understand the continental law of privacy, we must start by recognizing how deeply "dignity" and "honor" matter in continental law more broadly. Privacy is not the only area in which continental law aims to protect people from shame and humiliation, from loss of public dignity. The law of privacy, in these continental countries, is only one member of a much wider class of legal protections for interpersonal *respect*. The importance of the value of respect in continental law is most familiar to Americans from one body of law in particular: the continental law of hate speech, which protects minorities against disrespectful epithets. But the continental attachment to norms of respect goes well beyond hate speech. Minorities are not the only ones protected against disrespectful epithets on the Continent. Everybody is protected against disrespect, through the continental law of "insult," a very old body of law that protects the individual right to "personal honor."[53] Nor does it end there. Continental

53. Whitman, *supra* note 42, at 1295-360.

law protects the right of workers to respectful treatment by their bosses and coworkers, through what is called the law of "mobbing" or "moral harassment." This is law that protects employees against being addressed disrespectfully, shunned, or even assigned humiliating tasks like xeroxing.[54] Continental law also protects the right of women to respectful treatment through its version of the law of sexual harassment. It even tries to protect the right of prison inmates to respectful treatment, as I have noted in a recent book, to a degree almost unimaginable for Americans.[55]

Why does continental law work so hard to guarantee norms of "respect," "dignity," and "personal honor" in so many walks of life? This is a question to which I believe we must give a different answer from the one Europeans themselves commonly give. Europeans generally give a dramatic explanation for why dignity figures so prominently in their law: They assert that contemporary continental dignity is the product of a reaction against fascism, and especially against Nazism.[56] Having experienced the horrific indignities of the 1930s and 1940s, continental societies, Europeans say, have mended their ways. Europe has dignity today because Europe was traumatized seventy years ago. This is an answer that is often embraced by Americans, too—most notably Robert Kagan, in his recent bestseller *Of Paradise and Power*.[57]

And indeed, it is hard to resist a story with so much natural drama. But I have tried to demonstrate that the real story is different, and much more complicated. The European culture of dignity is not well-understood as any kind of simple reaction against fascism; even the place of fascism in the making of European dignity is more ambiguous than one might suppose. In fact, the history of the continental law of dignity begins long before the postwar period. It begins in the eighteenth, and even the seventeenth, centuries. The continental societies that we see today are the descendants of the sharply hierarchical societies that existed two or two-and-a-half centuries ago—of the aristocratic and monarchical societies of which the France of Louis XIV was the model. In point of fact, continental law has enforced norms of respect and dignity for a very long time. In earlier centuries, though, only persons of high social status could expect their right to respect to be protected in court. Indeed, well into the twentieth century, only high-status persons could expect to be treated respectfully in the daily life of Germany or France, and only high-status persons could expect their "personal honor" to be protected in continental courts. Members of the

54. *See* Gabrielle S. Friedman & James Q. Whitman, *The European Transformation of Harassment Law: Discrimination Versus Dignity*, 9 COLUM. J. EUR. L. 241 (2003).

55. JAMES Q. WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE 84-92 (2003).

56. *See, e.g.*, BEIGNIER, *supra* note 42, at 7; *infra* notes 126, 161 and accompanying text.

57. ROBERT KAGAN, OF PARADISE AND POWER: AMERICA AND EUROPE IN THE NEW WORLD ORDER 11, 58-62 (2003).

lower orders—the vast majority of the population—certainly had no meaningful right to respect. Quite the contrary.[58]

What we see in continental law today is the result of a centuries-long, slow-maturing revolt against that style of status privilege. Over time, it has come to seem unacceptable that only certain persons should enjoy legal protections for their "dignity." Indeed, the rise of norms of respect for *everybody*—even minorities, even prison inmates—represents a great social transformation on the Continent. Everybody is now supposed to be treated in ways that only highly placed and wealthy people were treated a couple of centuries ago. Germany and France have been the theater of a *leveling up*, of an extension of historically high-status norms throughout the population. As the French sociologist Philippe d'Iribarne has elegantly put it, the promise of modern continental society is the promise that, where there were once masters and slaves, now "you shall all be masters!"[59]

The uncomfortable paradox, as I have tried to show, is that much of this leveling up took place *during* the fascist period, for fascist politics involved precisely the promise that all members of the nation-state would be equal in "honor"—that all racial Germans, for example, would be "masters."[60] For that very reason, some of the fundamental institutions of the continental law of dignity experienced significant development under the star of fascism. In fact, the fascist period, seen in proper sociological perspective, was one stage in a continuous history of the extension of honor throughout all echelons of continental society.

This long-term secular leveling-up tendency has shaped continental law in a very fundamental way.[61] Contemporary continental hate speech protections, for example, can be traced back to dueling law: In the nineteenth century, continental courts protected the right to respect only of the dueling classes. Today they protect everybody's right to respect; indeed, the rules of dueling have had a striking influence in the Continent, sometimes being imported bodily into the law. Contemporary protections for prison inmates have a very similar history: In the eighteenth century, continental law maintained sharp distinctions between high- and low-status punishments. If executed, high-status offenders were beheaded, while low-

58. *See* WHITMAN, *supra* note 55, at 101-42; Whitman, *supra* note 42, at 1320-30.

59. PHILIPPE D'IRIBARNE, VOUS SEREZ TOUS DES MAÎTRES!: LA GRANDE ILLUSION DES TEMPS MODERNES (1996).

60. James Q. Whitman, *On Nazi 'Honour' and the New European 'Dignity,' in* DARKER LEGACIES OF LAW IN EUROPE: THE SHADOW OF NATIONAL SOCIALISM AND FASCISM OVER EUROPE AND ITS LEGAL TRADITIONS 243, 251-62 (Christian Joerges & Navraj Singh Ghaleigh eds., 2003).

61. In my other writings on this subject, I have argued that American law is the product of a converse leveling-down tendency. *See* WHITMAN, *supra* note 55; Whitman, *supra* note 42. I do not pursue the same argument here because I do not believe that we can clearly identify historically low-status patterns of privacy protection that have generalized themselves in the United States in the way that other historical low-status practices have.

status offenders were hanged; if spared, high-status offenders were housed in comfortable apartments, while low-status offenders were subjected to degrading penal slavery. In the two centuries since the French Revolution, the old high-status forms of punishment have gradually been generalized to all: All inmates are now treated according to a regime of imprisonment that was once reserved to figures like Voltaire.[62]

Such has been the history of the continental law of respect. It is a history, as I have tried to show, that has always been closely linked with the history of continental etiquette, which also began as a set of rules for courtiers, only to be generalized to the entire population. Indeed, the rules of etiquette, like the rules of dueling, have sometimes exercised a direct influence on the making of the European law of respect, which is often concerned with matters like the legal right to be addressed as "vous" or "Sie."[63]

This world of continental respect is also the world of continental privacy. When continental lawyers speak of "privacy" as a set of rights over the control of one's image, name, and reputation, and over the public disclosure of information about oneself, they are speaking to these selfsame continental sensibilities. To be sure, they are talking about privacy in a way that many Americans also talk about it. The idea that privacy is really about the control of one's public image has long appealed to the most philosophically sophisticated American commentators, from Alan Westin,[64] to Charles Fried,[65] to Jeffrey Rosen,[66] to Thomas Nagel.[67] In its most compelling form, the claim has come from Robert Post: For Post, privacy law protects norms of dignity that are "civility rules," just like the norms of etiquette; and without the protection of such norms, he argues, no society can maintain any form of community.[68] Moreover, similar ideas can already be found in the most famous of American articles, Samuel Warren and Louis Brandeis's 1890 *The Right to Privacy*.[69] All of these American writers have viewed the danger in the violation of our "privacy" as the danger that we will lose the capacity to control what Erving Goffman famously called our "presentation of self"—our image before the eyes of

62. WHITMAN, *supra* note 55, at 9-10.

63. *See* Whitman, *supra* note 42, at 1299-300.

64. ALAN F. WESTIN, PRIVACY AND FREEDOM (1967).

65. Fried, *supra* note 1.

66. ROSEN, *supra* note 46.

67. THOMAS NAGEL, CONCEALMENT AND EXPOSURE 4 (2002); *see also* Stanley I. Benn, *Privacy, Freedom, and Respect for Persons*, *in* NOMOS XIII: PRIVACY 1 (J. Roland Pennock & John W. Chapman eds., 1971) (grounding privacy in a right to autonomy and respect).

68. ROBERT C. POST, *The Social Foundation of Privacy*, *in* CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT 51, 86 (1995).

69. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

others in society.[70] All of them have thought of our right to *privacy*, perhaps a shade paradoxically, as our right to a *public* image of our own making, as the right to control our public face. Indeed, it is precisely for that reason that they have insisted on the connection between privacy and personhood.

So the prevailing continental conception is also the one that most thoughtful American commentators on privacy and "personhood" have found the wisest and most sophisticated. But if this conception has triumphed in continental law, it is not because European lawyers possess any unique measure of wisdom or sophistication. Nor is it because they alone recognize the norms that are necessary for the maintenance of community. Human communities can be founded on the widest variety of norms. As for law: It is not about the worldly realization of wisdom or sophistication as such. Law is about what works, what seems appealing and appropriate in a given society, and the conception of privacy as control of one's "image" has succeeded because it fits into continental social traditions, and into a quotidian continental culture of respect. Continental privacy is "continental" in much the way that continental hate speech law is "continental," and in much the way that continental prison law is "continental." For that matter, it is "continental" in much the way that continental etiquette is "continental"—for, *pace* Professor Post, the norms of "civility," far from being universal, vary dramatically from community to community.

Indeed, etiquette makes, as so often, a striking example of the social roots of European dignitary law. It is not an accident that both etiquette and privacy law show the same anxious preoccupation with "public image." Thus, it is common for continental etiquette guides to open with a section called "how we present ourselves before the world";[71] or "the *politesse* of appearances";[72] or more broadly a section on how to maintain the correct external look and manners.[73] Rules about how to dress and how to wear makeup are part of continental etiquette just as are rules about how to comport oneself on the street, at the table, or in the workplace.[74] Continental etiquette is indeed overwhelmingly about "the presentation of self in everyday life," just like continental privacy law. In fact, continental authors sometimes consciously present etiquette and privacy law as related subjects: For example, you can buy a book for German journalists,

70. ERVING GOFFMAN, THE PRESENTATION OF SELF IN EVERYDAY LIFE (1959).

71. GIAN AMEDEO ROSSINI, IL GRANDE LIBRO DEL GALATEO [7] (1997) ("Come ci si presenta al mondo.").

72. DENUELLE, *supra* note 17, at 9-22.

73. GISELA TAUTZ-WIEßNER, LEBENSART: ERFOLGREICH UND BELIEBT DURCH GUTE UMGANGSFORMEN 15-57 (1993).

74. *See, e.g.*, HERMINE DE CLERMONT-TONNERRE, POLITESSE OBLIGE. LE SAVOIR-VIVRE AUJOURD'HUI 15-49 (1996); ROSEMARIE WREDE-GRISCHKAT, HOHE SCHULE DES GUTEN BENEHMENS. ERFOLGREICH UND SICHER AUF JEDEM PARKETT 23-82, 105-68 (1995).

published by the leading German newspaper, called *Kleiner Knigge des Presserechts*—a little etiquette book of press law—which treats all of the standard questions of privacy as questions of good manners.[75]

But it is not just that the conception of privacy as control over one's image fits into the traditions of continental etiquette. It fits into the continental traditions of dignity, respect, and personal honor more broadly.[76] As we shall see shortly, continental privacy law, like most continental law of respect, developed largely from the law of insult. It even has connections with dueling. It has a Nazi history. Most generally, it fits within the tradition of status revolution that has shaped so much of continental law—the revolution of leveling up. Indeed, as I want to insist in this Article, continental privacy protections offer perhaps the paradigmatic example of high-status norms that have been generalized to the wider population. For as we can all instantly recognize, the conception of privacy as control over one's public image is a conception originally and primarily concerned with the doings of very high-status persons.

Indeed, critics have always insisted that a notion of privacy as a right to control one's "image" is a notion primarily of interest to people of very high status—to personages like the Warrens of Boston, or for that matter like Princess Caroline of Monaco, whose affairs still provide constant grist for the continental privacy mill. The conception of privacy as control of one's image rests, at base, on the idea that one ought to be able to keep one's name and picture out of the newspapers. This is obviously a conception that matters primarily to members of "society" as the term is used in the phrase "society pages."

And that is just what we see in continental privacy law: a high-status conception of privacy, a "society" conception of privacy. In fact, it is almost comical to read off the names in the captions of the leading postwar continental cases. Open a book on comparative privacy law, and here are the names you will see: Princess Soraya of Iran,[77] Princess Caroline of Monaco,[78] Prince Ernst August of Hanover.[79] There is a remarkable disproportion of royalty in continental privacy thinking. Down to this day, in fact, German texts list royalty first among the classes of "public figures"

75. RUDOLF GERHARDT & ERICH STEFFEN, KLEINER KNIGGE DES PRESSERECHTS (2002).

76. For similar, but sketchy, historical observations, see Heinz Holzhauer, *Zur Vorgeschichte des allgemeinen Persönlichkeitsrechts*, *in* RECHT DER PERSÖNLICHKEIT 51, 62-71 (Hans-Uwe Erichsen et al. eds., 1996).

77. DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 124-28 (2d ed. 1997).

78. Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ] [Supreme Court] 131, 332 (F.R.G.); *see also* BVerfG, 1 BvR 653/96, v. 15.12.1999, 53 N.J.W. 1021 (2000).

79. For a description of his peculiar importance, and for citations to additional sources, see JÖRG SOEHRING, PRESSERECHT: RECHERCHE, DARSTELLUNG UND HAFTUNG IM RECHT DER PRESSE, DES RUNDFUNKS UND DER NEUEN MEDIEN 428 (3d ed. 2000).

who require special treatment in the law of privacy,[80] while French texts, the product of a deeper democratic tradition, only list royalty second, after politicians.[81] "Members of the aristocracy"[82] too are presented as classes that had to be specially treated. These are textbooks written in worlds that remain very different from ours. Even the nonroyals and nonaristocrats involved in the leading European privacy cases are often very prominent persons indeed: Hjalmar Schacht, former Nazi finance minister,[83] Robert Barcia, longtime *eminence grise* of the French Trotskyite party.[84] Indeed, an American cynic who wants to mock the vaunted continental commitment to privacy will point gleefully at these names. At core, the American will sneer, the continental protection for privacy grants everyone alike the right to be safe from paparazzi. Does this really have anything to do with the values of a true democracy? At best, continental privacy law is not a form of protection for universal human "personhood," but a means of regulating the relations between celebrities and the rest of us.

Nevertheless, as I want to insist, to take that mocking attitude would be to underestimate the moral claims of European leveling up, as it expresses itself in privacy law. There is more to the law than its practical impact. The law also aims to express social values—the continental law of privacy as much as or more than any other body of law. What the continental law of privacy expresses is the fundamental social importance of a commitment to extend royal treatment to everyone. Indeed, we cannot understand our transatlantic conflicts if we do not recognize the authentically wide social application of "society" privacy in continental law. Over the past several generations, the basic commitment to control of one's public image has been extended well beyond its origins in the problems of the Princess Carolines of the world, in ways that do indeed affect the lives of ordinary people. This is most especially true of the areas where the conflicts between continental and American norms are most heated—areas like consumer data, credit reporting, public nudity, and the dignity of criminal offenders. These are all realms of life in which continental law has forcefully extended privacy protections to noncelebrities and nonroyals. Control of one's

80. *See, e.g.*, PETER RAUE, PERSÖNLICHKEITSRECHTE: DIE VERTEIDIGUNG DER PERSÖNLICHEN EHRE 11-12 (1997). For an older example, see A. OSTERRIETH, DAS URHEBERRECHT AN WERKEN DER BILDENDEN KÜNSTE UND DER PHOTOGRAPHIE 173 (Bruno Marwitz ed., 2d ed. 1929). One notes with bemusement that within the second category of public figures described in this text, "professors and academics" rank second after politicians, and ahead of "writers, artists, virtuosos, actors." Ah Germany!

81. BERTRAND, *supra* note 10, at 26-32.

82. SOEHRING, *supra* note 79, at 432 (noting that members of the aristocracy were not ipso facto public figures, but were peculiarly liable to become public figures on account of their activities or accomplishments).

83. *See* STEFAN GOTTWALD, DAS ALLGEMEINE PERSÖNLICHKEITSRECHT: EIN ZEITGESCHICHTLICHES ERKLÄRUNGSMODELL 81-85 (1996).

84. Barcia c. S.A. Groupe Express, No. 2000/14309, slip op., CA Paris, 1e ch., Sept. 20, 2001.

"image," in the continental mind, now includes more than everybody's right to keep one's names out of the newspapers. It also includes everybody's right to control the use of one's consumer data and the like, everybody's right to privacy in the workplace, everybody's right (if one should need it) to respectful imprisonment, and more. Continental privacy law is, as it were, "society" privacy for everybody.

One recent German popular guide to the law proudly puts it in this way, in language that deserves to be underlined. Privacy rights, the book explains, are part of a larger law of the "defense of personal honor," and nowadays it's not just the "royal houses" whose image is threatened; "*everybody* is in danger."[85] Silly enough—but also truly appealing in its way. Of course it matters to insist that *everybody* counts the same way royalty does, from racial minorities and prison inmates on up through the ranks of society.

IV. THE RISE OF FRENCH PRIVACY LAW

There is no better way to grasp this continental social ideal than to trace its historical development, from its origins in the nineteenth-century world of dueling, through the Nazi period, and on into its modern forms. Continental jurists have always tried to understand "privacy" as a species of personal honor. In particular, going back to the nineteenth century, continental thinking has always treated privacy as a value primarily threatened by two forces: the excesses of the free press and the excesses of the free market. From the point of view of the nineteenth-century continental tradition, there were two things that peculiarly menaced a respectable person's "honor": loose talk, and the grubbiness of the world of buying and selling. Continental privacy law has been shaped by a longstanding battle waged against both. Indeed, the history of continental privacy law has been, in essence, the history of the resistance, in the name of "honor," to two of the fundamental values of American liberty: the value of free speech, and the value of private property as distributed through the market.

French law developed mostly over the period of 1790 to 1900, while German law developed later, from about 1880 to 1960. The two traditions have peculiar emphases. French law has had to struggle in a distinctive way with France's recurrent periods of sexual license, and German law was peculiarly formed by the events of the Nazi period and after. Nevertheless, both remain recognizably continental, and recognizably different from

85. RAUE, *supra* note 80, at 11-12; *cf.* ROSEN, *supra* note 46, at 202 (stating that, in America, "private citizens run the risk of being treated like celebrities in the worst sense, vilified rather than celebrated").

American law. In particular, in both countries, the law of privacy protection was built using the doctrinal resources of the classic continental law of personal honor—the law of insult—in tandem with the law of artistic and intellectual property.

Let us begin with France. French ideas about the protection of "private life" date at least to the early modern period. High-status families have always sought to protect their privacy in France, and they have sometimes succeeded. For example, for several centuries the French nobility successfully fought off efforts to require public registration of the mortgages on their real property, which would have exposed their finances for inspection.[86] There were other ways, too, in which high-status *ancien régime* Frenchmen sought to protect their privacy.[87]

But the modern history of French privacy protection, which has been sadly neglected,[88] begins with the Revolution, and most particularly with the introduction of freedom of the press. Freedom of the press has always made leading French observers nervous, even ones with very liberal beliefs. Thus, the first French effort to create constitutional protections for freedom of the press was already accompanied by a proviso intended to guarantee that "private life," as an integral part of personal "honor," would not be subject to press depredations. The Constitution of 1791, the first detailed revolutionary blueprint for a new kind of European liberal society, included extensive protections for freedom of the press. But at the same time, it added protections against "calumnies and insults relative to private life."[89] One of the draftsmen of the Constitution, the Jacobin Jérôme Pétion, speaking during the flush of revolutionary excitement in August of 1791, explained the intent of the new document in this way: A vigorous free press was unconditionally necessary for the maintenance of liberal government.[90] Nevertheless, it was true that those very press liberties threatened the "private person."[91] For that reason, it was important to confer upon persons whose private lives had been violated some legal recourse against "insults." To do so would not undermine the freedoms gained in the Revolution. On the contrary, it would achieve a revolutionary end. In fact, the "new

86. ALEX FRANKEN, DAS FRANZÖSISCHE PFANDRECHT IM MITTELALTER 20-23 (Scientia Verlag 1969) (1879); JULES MINIER, PRECIS HISTORIQUE DU DROIT FRANÇAIS: INTRODUCTION A L'ETUDE DU DROIT 55, 637-38 (Paris, A. Maresq et E. Dujardin 1854).

87. *See* Orest Ranum, *The Refuges of Intimacy*, *in* 3 A HISTORY OF PRIVATE LIFE 207, 210-37 (Arthur Goldhammer trans. & Roger Chartier ed., 1989).

88. French texts generally treat the protection of privacy as a phenomenon dating only to the second half of the nineteenth century. *See, e.g.*, BEIGNIER, *supra* note 42, at 46-47.

89. CONSTITUTION du 3 septembre 1791, tit. III, ch. V, art. 17 ("Les calomnies et injures contre quelques personnes que ce soit relatives aux actions de leur vie privée, seront punies sur leur poursuite.").

90. J. Pétion, *Discours sur la liberté de la Presse*, 16 COURIER DE PROVENCE 169 (1791).

91. J. Pétion, *Suite du discourse sur la liberté de la Presse*, 16 COURIER DE PROVENCE 198 (1791).

doctrine," with its emphasis on the rights of ordinary private persons, directly "contradicted the ideas of the *ancien régime*."[92] After all:

> [In the *ancien régime*] the least offense given to what would be called the honor of a man of position was a serious crime, which could not be punished severely enough, while an offense to a simple citizen hardly received any attention on the part of the law; but for that very reason, the new doctrine is all the more correct and in conformity with the principles of the new order of things.[93]

The first manifestation of "privacy" in French law thus came in the form of a classic statement of the ambition to bring everybody up in status. The introduction of privacy protections was indeed akin to contemporary developments like the introduction of the guillotine. The guillotine arrived shortly after Pétion gave this speech, as a means of extending the high-status privilege of beheading to all persons.[94] It too belonged to a "new order of things" in which everybody's honor was to be protected.

These remained the characteristic ideas of French privacy law thereafter—notably in 1819, the year of the passage of the first post-Napoleonic law lifting press censorship. As the Restoration successfully established its authority, the government of Louis Philippe consented to tolerate a freer press. But the idea of press freedom continued to trouble even liberally minded Frenchmen, and the classic nineteenth-century statement of the importance of privacy emerged as soon as press censorship was even partially lifted. In fact, it came once again from a leading advocate of press reform: Pierre-Paul Royer-Collard, a leading politician, professor of philosophy at the Sorbonne, and hero of French liberalism. Royer-Collard, even as he defended press liberalization, gave a famous speech warning that private life had to be "walled off" ("murée") against the danger of "calomnie," insult. The press, he said, had to be free, but the only proper realm for press freedom was the public sphere, and even true facts about private life could not be lawfully published.[95] In the course of his speechifying, Royer-Collard produced a classic morsel of French metaphoric oratory—"private life must be walled off!"—that established itself as a standard continental slogan, repeated well into the twentieth century.[96]

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92. *Id.* at 199.

93. *Id.*

94. WHITMAN, *supra* note 55, at 109-13.

95. *See* 1 DE BARANTE, LA VIE POLITIQUE DE M. ROYER-COLLARD, SES DISCOURS ET SES ÉCRITS 474-75 (Paris, Didier 1863).

96. *E.g.*, OSTERRIETH, *supra* note 80, at 179; ALBERT VAUNOIS, LA LIBERTÉ DU PORTRAIT 6 (Paris, Chevalier-Marescq 1894).

To be sure, what Royer-Collard produced was an oration, not a law, and for several decades thereafter there was little by way of protection for privacy in the letter of French law. For that reason, French legal historians treat the period of the 1820s through the 1840s as a time when there was simply no protection for private life.[97] But it is a real mistake to conclude from the absence of *law* about privacy that no protection existed. In this period, one's private affairs remained a matter of one's honor, and one's honor remained a thing more precious, as French authors regularly declared, than life itself. During the decades after 1819, the primary means of protecting one's honor was through the duel, and "private life" was defended, at least sometimes, in exactly that way. Thus, the dueling literature listed "the delicacy of private life" among the aspects of "honor" that demanded protection.[98] And it was indeed so protected, as we can see from the example of one of the most famous dueling incidents in French history, the case of the Duchess of Berry. The Duchess was a leading royalist agitator and mother of the Comte de Chambord, the pretender to the throne. While she was being held prisoner in a fortress in 1833, after an attempt to foment rebellion, it was publicly revealed that she was pregnant—even though she had been widowed for some years. As Louis Blanc described the resulting scandal, the Duchess's "intimate life" was "exposed to the insulting commentaries of the multitude"; "[i]n vain," he added, "had she counted upon that solidarity of honor that reigns among relatives, even ones of obscure social condition, and that, protecting families, saves them from scandal by keeping secrets."[99] Her family did not defend her, but several royalists did: This famous violation of royal privacy caused more than one duel between royalists and republicans—including one in which several royalist journalists challenged several republican ones to a gigantic duello,[100] and another in which the eminent General Bugeaud killed a member of the Chamber of Deputies.[101] The honor of "private life" was not protected by the law in the 1830s, but it *was* defended.

By the mid-nineteenth century, though, this extravagant world of dueling honor began slowly to fade, and questions of private life began to migrate into the law. In part this reflected uneasiness about the traditions of dueling, as commentators demanded that questions of honor be settled in

97. BERTRAND, *supra* note 10, at 2.

98. 2 EUGÈNE CAUCHY, DU DUEL, CONSIDÉRÉ DANS SES ORIGINES ET DANS L'ÉTAT ACTUEL DES MOEURS 41 (Paris, Guillaumin 1863).

99. 4 LOUIS BLANC, HISTOIRE DE DIX ANS, 1830-1840, at 22-23 (Paris, Pagnerre 1844).

100. For an account of the incident, see 1 FOUGEROUX DE CAMPIGNEULLES, HISTOIRE DES DUELS ANCIENS ET MODERNES 385-87 (Paris, Tessier/Cherbuliez 1835).

101. *Bugeaud de la Piconnerie*, *in* THE 1911 EDITION ENCYCLOPEDIA, *at* http://www.1911encyclopedia.org/B/BU/BUGEAUD_DE_LA_PICONNERIE.htm (last visited Nov. 6, 2003).

court.[102] But it also reflected shifting patterns of both political and sexual liberation. In the middle of the nineteenth century, the claims of the free press became more insistent, and public morality became less strait-laced. Both developments created privacy problems for French law.

Already in the 1850s, some famous cases affirmed the core privacy right that would come to be known in French law as the "right to one's image." These first cases involved deathbed photographs—in two cases, deathbed photographs of celebrity beauties, and in one case the deathbed photograph of a kind of Mother-Teresa-type street missionary.[103] But it was the following decades that saw the most striking developments—in particular, developments that involved the comparatively unbuttoned sexual atmosphere of later-nineteenth-century Paris. Sexual license and the law of privacy have always gone hand in hand; and France had been famous for its relatively loose morals since at least the eighteenth century, the aristocratic age of Watteau, Boucher, and Fragonard. This tradition revived in the mid-nineteenth century, the age of the cancan, and it gave rise to numerous "privacy" issues, as cultures of sexual liberation tend to do. Especially beginning in the gay years of the 1860s, "right to one's image" cases began to multiply.

A particularly famous 1867 case involved Alexandre Dumas père, the author of *The Three Musketeers*—itself an important document of nineteenth-century French dueling culture. Dumas père, then well on in years, became involved in a love affair with Adah Isaacs Menken, a thirty-two-year-old Texas actress and horsewoman, famous for appearing on stage dressed only in a body stocking. Obviously reveling in their rejection of bourgeois values, the scandalous Menken and Dumas posed (together with Menken's mother!) for several more or less salacious photographs. Some of them showed Menken in her underwear. Others showed her in amorous poses with Dumas, who was not wearing a jacket. Dumas, whether through inadvertence or sheer glorious indifference, did not enter into any express agreement with the photographer about the rights to publish the photos. Seizing his chance, the photographer tried to register his copyright in what were highly marketable images. In responding to the photographer's application, the copyright officials were not entirely without delicacy: They forbade him to display the photos showing Miss Menken in

102. *E.g.*, 1 CAUCHY, *supra* note 98, at 3, 18.

103. Sergent c. Defonds, Trib. civ. Seine, Nov. 11, 1859, 6 ANNALES DE LA PROPRIÉTÉ INDUSTRIELLE ARTISTIQUE ET LITTÉRAIRE [A.P.I.A.L.] 168 (1860); Félix c. O'Connell, Trib. civ. S[e]ine, June 16, 1858, 4 A.P.I.A.L. 250 (1858); Soeur Mélanie c. Fougère, Ord. de Référé, Apr. 11, 1855, 6 A.P.I.A.L. 167 (1860). The beauties were Rachel, a famous tragic actress, and a certain Mademoiselle Sergent, who, to judge by the opinion, lived something of a loose but exciting life. The missionary was Soeur Rosalie. The graves of both Rachel and Soeur Rosalie are still visited today by Paris cemetery tourists. For general discussion, see Dumas c. Jacquet, Trib. civ. Seine, June 20, 1884, 33 A.P.I.A.L. 280, 286 (1888) (comment Vaunois).

her underwear.[104] With regard to the other photos, though, they gave the photographer free rein, and he marketed them widely, causing an international scandal.

Dumas, perhaps under pressure from his family, sued.[105] But could any objection be raised in law? This was a difficult question in the 1860s. The photographer had a property right, the copyright in the photographs. Indeed, Dumas admitted in open court that he had sold the rights.[106] This was the mid-nineteenth century, and property rights were generally regarded as something close to sacred in the legal cosmos of the day.[107] Nevertheless, adventurous legal thinkers were beginning to challenge the sanctity of private property,[108] and the *Dumas* court did the same. If Dumas did not have the property right, was there any countervailing "right" that he could claim? In a seminal decision, the Paris appeals court answered that question by holding that he had a new kind of "right to privacy," which qualified the absolute claims of the law of property. The court adopted Royer-Collard's famous 1819 language about "private life": Even if a person had tacitly consented to the publication of embarrassing photos, that person must retain the right to withdraw his consent. "The very publication" of such photos could put such a person on notice "that he had forgotten to take care for his dignity, and remind him that *private life must be walled off* in the interest of individuals, and often in the interest of good morals as well."[109] The court accordingly rendered the photographer's property right effectively meaningless, ordering him to sell all rights in the photographs to Dumas.

Privacy, the court had effectively held, must sometimes be allowed to trump property, at least where lascivious images were involved: One's privacy, like other aspects of one's honor, was not a market commodity that could simply be definitively sold. Any sale by a person who had momentarily "forgotten his dignity" had to remain effectively voidable. In subsequent cases, involving some of the most famous artists of the day, this sort of thinking began to gel into a developing right to one's image—an important part of the French law of privacy, understood as an aspect of the

104. Dumas c. Liébert, CA Paris, May 25, 1867, 13 A.P.I.A.L. 247 (1867).

105. Such is the account, at least, of WOLF MANKOWITZ, MAZEPPA: THE LIVES, LOVES AND LEGENDS OF ADAH ISAACS MENKEN 177 (1982). For a somewhat different account, see BERNARD FALK, THE NAKED LADY OR STORM OVER ADAH 199-203 (1934).

106. *See* MANKOWITZ, *supra* note 105, at 177.

107. For a classic account, see 1 JUSTUS WILHELM HEDEMANN, DIE FORTSCHRITTE DES ZIVILRECHTS IM XIX JAHRHUNDERT 14-26 (1910); and 2 *id.* at 1-79.

108. For examples of this developing attitude, and the rebellion against it in this period, see PAOLO GROSSI, AN ALTERNATIVE TO PRIVATE PROPERTY: COLLECTIVE PROPERTY IN THE JUDICIAL CONSCIOUSNESS OF THE NINETEENTH CENTURY (Lydia G. Cochrane trans., 1981).

109. *Dumas*, 13 A.P.I.A.L. at 250 ("[L]'effet même de la publication . . . que si la vie privée doit être murée dans l'intérêt des individus, elle doit l'être aussi souvent dans l'intérêt des mœurs . . . ." (emphasis added)).

law of artistic and intellectual property.[110] One memorable 1877 dispute, for example, involved Jean-Auguste-Dominique Ingres, the brilliant history painter and portraitist. The cult of nude figure drawing was at its height in mid-nineteenth-century France, and Ingres frequently found it difficult to capture the ladies who sat for him unless he had first sketched them nude. Of course his society clients would not agree to sit nude themselves, so Ingres hired models with appropriate body types, and did nude sketches to which he added the recognizable heads of his clients. It was a consequence of this louche artistic practice that a nude sketch of one of his sitters, Madame Moitessier, appeared among his effects at his death in 1868. When his executor tried to sell the drawing, Monsieur Moitessier sued. The court hearing the case, like the *Dumas* court, assigned the property right in the sketch to Ingres's successors. But, again like the *Dumas* court, the court held that Monsieur Moitessier had a privacy right, a right to his wife's "image," which served to limit the artist's property right. The court held that

> property itself recognizes limits established not only by positive law, but also by social norms [*les convenances sociales*]; that the first of these norms consists in the respect owed to the inviolability of the domestic hearth; that that inviolability would be offended if the image of the *mère de famille* could be surrendered to the publicity of a banal public auction.[111]

The court accordingly ordered the dealer in possession of the sketch to sell it to Monsieur Moitessier. The same basic analysis was confirmed in yet further high-profile cases over the following decades, which established the principle that we have a "sacred and inalienable right over ourselves, and consequently over the reproduction of our image."[112] The most famous of these was the 1900 lawsuit between James Whistler and the Baronet

110. For codification of this principle, see CODE DE LA PROPRIÉTÉ INTELLECTUELLE [C. PROP. INTELL.] art. L. 122-4 (Pierre Sirinelli et al. eds., 3d ed. 2002), as well as the extensive reportage in the *Annales de la Propriété Industrielle Artistique et Littéraire*. *See, e.g.*, *supra* notes 103-104.

111. Moitessier c. Féral, Trib. civ. Seine, Dec. 5, 1877, 23 A.P.I.A.L. 92, 95 (1878) ("Que la propriété elle-même reconnait des bornes établies non-seulement par la loi positive, mais par les convenances sociales; que la première de ces convenances consiste dans le respect dû à l'inviolabilité du foyer domestique; que cette inviolabilité serait atteinte si l'image de la mère de famille pouvait être livrée à la publicité d'une exposition d'enchères banales . . . ."). For further details of the case, see Gary Tinterow, *Madame Paul-Sigisbert Moitessier, née Marie Clotilde-Inés de Foucauld*, *in* PORTRAITS BY INGRES: IMAGE OF AN EPOCH 426, 441 (Gary Tinterow & Philip Conisbee eds., 1999); and Hans Naef, *New Material on Ingres's Portraits of Mme Moitessier*, BURLINGTON MAG., Mar. 1969, at 149.

112. Dumas c. Jacquet, Trib. civ. Seine, June 20, 1884, 33 A.P.I.A.L. 280, 286 (1888) (comment Vaunois) ("[D]roit sacré et inalienable que nous avons sur nous-mêmes et, par suite, sur la reproduction de notre figure . . . ." (internal quotation marks omitted)).

Eden, which Whistler himself chronicled in his little screed *The Baronet and the Butterfly*.[113]

In part, French privacy law was thus the product of the culture of the Paris art world, with its nude models, defiant immoralism, and large artistic egos. The cases that grew out of that world generally concluded that there was a right to one's "image" that was distinct from, and in tension with, rights of property. But that was only one of the strains in the making of French privacy law. The other had to do with the free press, and it reflected exactly the same anxieties that had accompanied press liberalization in 1791 and 1819.

Indeed, it was in the tradition of uneasiness about the free press that privacy received its first formal statutory protection of the nineteenth century, in 1868, during the waning years of Napoleon III's imperial regime. Over the course of the 1860s, the period of the so-called "Liberal Empire," Napoleon III granted increasing civil rights in France. This included the creation of a new press policy in 1868, which, with some limitations, allowed effective freedom of the press. The French press, meanwhile, had been experiencing a small renaissance of critical and satirical reportage, as well as a renaissance of French caricature in the work of artists like Honoré Daumier.[114] Attitudes had not changed since 1819, though, and the new law aimed to guarantee that freedom of the press would not open the door to insulting intrusions into the lives of respectable people. Thus, it carefully provided that, though the press was in principle free, every publication in a periodical of "a fact of private life" was a criminal offense—a punishable *contravention*, just as other insults were *contraventions*.[115] An interpretive circular of the Ministry of Justice added that while there was of course room for criticism of artists and other public figures, even the latter were (as they would continue to be) protected against "defamation and insult."[116] Concerns about the care of one's dignity thus continued to shadow press liberalization, just as they had in 1791.[117]

With the fall of Napoleon III, the climate certainly changed, and when the Third Republic turned to the regulation of the press, in 1881, its new

113. Eden c. Whistler, Cass. civ., Mar. 14, 1900, D.P. 1900, I, 497, 500; *EDEN VERSUS WHISTLER*: THE BARONET & THE BUTTERFLY (Notable Trials Library spec. ed. 1997) (1899); *see also* RIGAUX, *supra* note 42, at 157-59, 288.

114. *See generally* ROGER BELLET, PRESSE ET JOURNALISME SOUS LE SECOND EMPIRE 18-24 (1967) (surveying press activity under the Second Empire).

115. "Toute publication dans un écrit périodique relative à un fait de la vie privée constitue une contravention punie d'une amende de cinq cent francs. La poursuite ne pourra être exercée que sur la plainte de la partie intéressée." Loi Relative à la Presse (May 11, 1868), *in* H.F. RIVIÈRE ET AL., CODES FRANÇAIS ET LOIS USUELLES app. 2 at 19, 20 (1889). For the treatment of insults as *contraventions*, see Whitman, *supra* note 42, at 1349.

116. Loi Relative à la Presse, *supra* note 115, app. 2 at 20 n.3(b).

117. *See supra* text accompanying notes 89-94.

statute said nothing about "privacy" as such.[118] Nevertheless, courts continued to insist on the sacred character of "la vie privée"—for example, in forbidding a writer to base a novel on events revealed in the course of a criminal trial.[119] All told, France was, by the 1870s and 1880s, the home of a very visible law of the protection of privacy.[120] The reigning French view was captured by a characteristic account that appeared in 1888, two years before the publication of Warren and Brandeis's *Right to Privacy*. In that year, Émile Beaussire, an eminent legal philosopher of the day, summarized several decades of French development in the following way: The right to privacy was to be ranked among the rights to honor more broadly. This of course raised doubts about its place in the law. For understandably, Beaussire wrote, people viewed their "honor" as something that should be preserved through dueling, not through law: "When my honor is attacked, I gain nothing by filing suit against my calumniators."[121] Nevertheless, in the modern world, even persons of honor had to have recourse to the law, and the law had to occupy itself with persons of honor. This was the right context for understanding the right to privacy, for violations of privacy involved nothing less than the revelation of "infamous secrets," which could destroy the honor of such persons as a respected "père de famille."[122] And outside the most exceptional circumstances, the law could not allow such violations:

> [P]rivate honor, whatever its value per se and whatever its source, must be protected from all offenses. People have certainly mocked the excesses of the maxim "private life must be walled off." . . . [Nevertheless,] [t]he prying and insults of the world may be . . . more or less innocent or more or less culpable: no matter what, they violate the law when they tend to destroy, through public revelation . . . honor [*considération*] justly or unjustly acquired . . . .[123]

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118. Monique Contamine-Raynaud, *Le secret de la vie privée*, *in* L'INFORMATION EN DROIT PRIVÉ 406 (Yvon Loussouarn & Paul Lagarde eds., 1978). Contemporary commentary did worry over protecting the private life of the President of the Republic, though. *See* J. GAHIER, LA DIFFAMATION ET LA LOI DU 29 JUILLET 1881, at 80 (Paris, Librairie Générale de Jurisprudence 1893).

119. Le Figaro c. Chaperon, CA Paris, 4e ch., Dec. 2, 1897, 45 A.P.I.A.L. 61 (1899).

120. Not all French commentators approved of this development. One leading scholar, for example, argued that French law was beginning to entrench too drastically on the work of artists. The "right to one's image," he thought, should not extend beyond the traditional protection against "insult and defamation." VAUNOIS, *supra* note 96, at 6.

121. ÉMILE BEAUSSIRE, LES PRINCIPES DU DROIT 369 (Félix Alcan ed., Paris, Ancienne Librairie Germer Baillière 1888) ("Quand mon honneur est attaqué, je ne gagne rien à poursuivre en justice mes calomniateurs.").

122. *Id.* at 372-73.

123. *Id.* at 377-78 ("[L]'honneur privé, quelle qu'en soit la valeur en lui-même et dans son origine, doit être à l'abri de toute atteinte. On a pu railler ce qu'il y'a d'excessif dans la maxime

Similar accounts of the right to privacy as a right to "honor" made their way into other textbook accounts by the end of the nineteenth century as well,[124] and the importance of the protection of "honorable" privacy was something close to orthodoxy in France by the 1890s.

V. THE RISE OF GERMAN PRIVACY LAW

In Germany, similar developments were underway by the late nineteenth century. The world of the developing German law of privacy was not the overheated world of Paris high art, though, with its nude models and lascivious photos. Instead, it was the heady world of the German philosophy of free will. Moreover, German privacy law developed more slowly than French law, not really establishing itself before the middle of the twentieth century. And when German privacy law did establish itself, it was in connection with the painful experience of Nazism.

The German tradition of privacy protections is perhaps easiest to understand if we emphasize one point: German privacy law grew in large part out of an effort to create a richer German alternative to the ideas of liberty that grew up west of the Rhine, and especially to English ideas of liberty. The protection of privacy in the German tradition is regarded as an aspect of the protection of one of the most baffling of German juristic creations: "personality." Personality is a characteristically dense German concept, with roots in the philosophies of Kant, Humboldt, and Hegel. Standard texts describe this concept in the daunting language of continental philosophy. As one recent author explains, the German law of personality is a law of freedom—the law of the Inner Space, "'in which . . . [humans] develop freely and self-responsibly their personalities.'"[125] Standard texts also lodge the concept in the drama of modern German history: This law of freedom, they tell us, has especially flourished since the 1950s, when Germans applied the lessons they had learned from the Nazi disaster.[126] Clearly "personality" is somehow central to German legal culture. But the concept is likely to seem elusive to most readers. What is the "Inner

que 'la vie privée doit être murée.' . . . [Nevertheless,] [l]es curiosités et les médisances du monde peuvent être . . . plus ou moins innocentes ou plus ou moin blâmables: elles violent le droit quand elles tendent à détruire par une révélvation publique . . . une considération justement ou même injustement acquise . . . ."). For Beaussire's identification of "honneur" and "considération," see *id.* at 377.

124. *E.g.*, 1 A. BOISTEL, COURS DE PHILOSOPHIE DU DROIT 243-47 (A. Fontemoing ed., Paris, Ancienne Librairie Thorin et Fils 1899).

125. EBERLE, *supra* note 42, at 85 (quoting The Microcensus Case, Entscheidungen des Bundesverfassungsgerichts [BVerfGE] [Federal Constitutional Court] 27, 1 (7) (F.R.G.)).

126. *Id.* at 7. For a standard postwar German account, see Ernst von Caemmerer, *Wandlungen des Deliktsrechts*, *in* 2 HUNDERT JAHRE DEUTSCHES RECHTSLEBEN 49, 104-06 (Ernst von Caemmerer et al. eds., 1960).

Space"? How does guaranteeing the freedom of the "Inner Space" represent an antidote to Nazism?

To get a firmer handle on these difficult ideas, we must dig deeper into German intellectual history, and even into German theology. Personality is indeed a concept that Germans have often invoked where Americans would invoke liberty, and like liberty it does involve a kind of freedom. But from the beginning it was never quite the same as American freedom. Where Americans often think of "freedom" as opposed primarily to tyranny, nineteenth-century Germans often thought of "freedom" as opposed primarily to *determinism*. To be free was, in the first instance, not to be free from government control, nor to be free to engage in market transactions. Instead, to be free was to exercise *free will*, and the defining characteristic of creatures with free will was that they were unpredictably *individual*, creatures whom no science of mechanics or biology could ever capture in their full richness. For Germans who thought of things in this way, the purpose of "freedom" was to allow each individual fully to realize his potential *as* an individual: to give full expression to his peculiar capacities and powers.

This idea of "free" self-realization is as old as Leibniz, or even Erasmus. Indeed, its sources lie unmistakably in Christian Humanism.[127] But in its modern form, it is an idea that was especially championed by Wilhelm von Humboldt in the early nineteenth century.[128] The early nineteenth century was a period when Germans were struggling with the economic liberalism of Adam Smith, trying to learn the lessons of Smith while preserving some role for a managed economy as well as for ideals of freedom that were not defined by the market.[129] For writers of the period like Humboldt, it seemed essential to insist that human flourishing required the pursuit of individual fulfillment in forms the market could not provide. The paradigmatic free actor, for such German philosophers, was commonly the artist more than the consumer. The German philosophical tradition on the subject of freedom was thus close in spirit to the German tradition of so-called "national" economics, a school critical of free trade and in many ways of the free market more broadly. That does not mean that German philosophers (or German economists) did not believe in the freedom to buy and sell, of course. Nor does it mean that there have never been English or American writers who have found the German approach wise and

127. For an account, see CORNELIS AUGUSTIJN, ERASMUS EN DE REFORMATIE 13-16 (1962).

128. *See* LEONARD KRIEGER, THE GERMAN IDEA OF FREEDOM: HISTORY OF A POLITICAL TRADITION 166-69 (1957).

129. *See, e.g.*, LAURENCE DICKEY, HEGEL: RELIGION, ECONOMICS, AND THE POLITICS OF SPIRIT, 1770-1807, at 194-97 (1987).

beautiful.[130] It means only that the German tradition always put less of an emphasis on consumer sovereignty, and more of an emphasis on unfettered creation, than the Anglo-American tradition did—and most especially on the unfettered creation of the self, on the fashioning of one's image and the realization of one's potentialities. This approach to the problem of freedom formed a fundamental part of what Leonard Krieger, writing in the wake of the Nazi experience, famously called "The German Idea of Freedom":[131] an idea different from Anglo-American ideas of liberty—an idea focused much more on inward self-realization, and consequently much more open to the exercise of state power and regulation of the market.

Now these are philosophical ideas that are both vague and grandiose, and they are not obviously easy to translate into law. Certainly, they do not seem as easy to translate into law as the ideas of an Adam Smith. Nevertheless, they were embraced by German jurists of the second half of the nineteenth century, and particularly of the 1880s. This was the period when German public policy began to turn away from Smithian laissez-faire ideas, endorsing social insurance, cartelization, and protectionist policies. It was also the period when German philosophers turned strongly toward neo-Kantianism, a philosophical style fascinated with the tension between free will and determinism. It was during this same period that German lawyers began to turn away from seemingly crass Western ideas of personal liberty, endorsing the theory of personality as the true theory of freedom. Inspired by both Kant and Hegel, a number of leading legal thinkers set out to create a German law that would match the German philosophy of personality in depth and subtlety. In particular, they developed a German tradition that treated the protection of privacy simply as one aspect of the protection of personality more broadly: Privacy, for Germans, became one part of "free self-realization."

Like their French predecessors of several decades earlier, German jurists in and after the 1880s perceived their problem as a problem of honor, to be dealt with through the law of insult, in coordination with the law of artistic property. German society, like French society of the same period, was strongly attached to norms of respectability and honor, notably as asserted through dueling. It was also a society in which the law of insult played a correspondingly large role in legal thinking.[132] But the French way of talking about the problem was not very satisfactory to German scholars. When French authors like Royer-Collard or Beaussire spoke of "insults," they based their arguments on clumsily drafted modern statutes and vague

130. For a leading recent example of this tradition in the Anglo-American world, which could also be said to include Ralph Waldo Emerson and John Stuart Mill, see MARGARET JANE RADIN, CONTESTED COMMODITIES 54-60 (1996).

131. KRIEGER, *supra* note 128.

132. *See* Whitman, *supra* note 42, at 1313-32.

"social norms."[133] German scholars preferred a more solid juristic foundation, with citations to authoritative ancient texts and explorations of basic problems in legal philosophy. Rather than talking about ill-defined social norms, German jurists accordingly embarked on an impressive reinterpretation of one of the most confusing bodies of traditional law: the ancient Roman law of insult, which they combined with the law of artistic property to create a new body of personality law. This German reinterpretation of the ancient law of insult is one of the finest examples of nineteenth-century juristic virtuosity, and one of the most famous. It deserves to be described, even if only briefly, not least because it exercised an important influence on American scholars like Warren and Brandeis.

Let us then follow nineteenth-century German reasoning. The ancient Roman law of insult was by no means easy to use as a basis for a modern law of personality. The ancient Roman texts were extremely muddy. In very early Roman law, which produced a cryptic statute on the matter, the law of insult—*injuria*—seemed to cover certain injuries to a person's possessions. In addition, there were early Roman sanctions against casting spells, engaging in certain now-mysterious forms of public insults, and inflicting bodily injury.[134] Very gradually, over the long course of Roman history, this early grabbag of legal prohibitions also came to cover various kinds of disrespectful and insulting speech and treatment. In particular, as the confusing texts of the Digest of Justinian seem to show, it came to protect respectable women against lewd comments, and to guarantee to a certain extent that low-status persons would show proper deference to their betters, as well as that high-status persons would not insult their inferiors.[135] A variety of other interferences with the rights of other persons also apparently came to be considered "injuria."[136] Nowhere did the Roman jurists explain how they thought that physical "injuries" to persons and their possessions were related to verbal "injuries" directed at respectable women by mashers and the like, or give any account of what social purposes, if any, the Roman law of injuries was thought to serve.

This was not easy stuff to work with, but German scholars went to work with a will. In particular, they worked in the Hegelian tradition. Hegelian legal historians brought a characteristic approach to the understanding of legal evolution—an approach founded on Hegel's account of the history of punishment. According to the Hegelian view, the history of punishment was one in which the primitive talionic rule of "eye for an eye,

133. *See supra* Part IV.

134. For a summary of these prohibitions, see RÖMISCHES RECHT § 131 (Heinrich Honsell et al. eds., 4th ed. 1987).

135. For a convenient collection of translated texts, see BRUCE W. FRIER, A CASEBOOK ON THE ROMAN LAW OF DELICT 3-6, 177-200 (1989).

136. *See* RUDOLPH VON JHERING, *Rechtsschutz gegen injuriöse Rechtsverletzungen*, *in* 3 GESAMMELTE AUFSÄTZE 233, 234-35 (Jena, Fischer 1886).

tooth for a tooth," had gradually given way to more sophisticated concepts of proportionality. This was an evolution, as Hegelians saw it, in which a naive view of the world obsessed with things—eyes and teeth—had gradually evolved into a view of the world capable of grasping larger immaterial values.[137]

The creators of the German law of "personality" interpreted the development of the ancient Roman law of insult in the same way—as an evolution of the "spirit" of Roman law, as Rudolf von Jhering, the most brilliant of German law professors, called it,[138] from the material to the immaterial. The argument ran as follows: Honor had always been at stake in the law of insult, even in the earliest periods. At first, the Romans, still obsessed with things, had thought that the law could only vindicate monetizable rights, mere material rights. But as sensibilities about honor grew richer and deeper, these early legal protections gradually ripened, until the law grew to cover all aspects of honor, protecting also against verbal insults and other shows of disrespect.[139] The evolution of the law of honor, like the evolution of the law of punishment, was thus an evolution in the "spirit of the times"—one in which primitive protections for merely monetizable interests had gradually matured into sophisticated protections for "noneconomic" interests.[140] That slow evolution, from the material to the immaterial, was moreover continuing in the modern world: The modern world was now producing what Jhering called, in a famous 1885 article, the law of "insulting tortious injuries." In particular, modern protections were now evolving beyond protections against immaterial verbal insults, to include the protection of such immaterial goods as one's name[141] and one's photographed image,[142] one's control of one's correspondence,[143] as well as access to modern amenities such as the telegraph and the tram.[144]

Jhering was one of a number of German scholars to make this sort of argument, some relying on ancient Roman law, some drawing on Germanic sources.[145] This Hegelianized law of insult was one main strand in the new German law of personality. The other was the law of *Urheberrecht*, creators' rights. The rights of an artistic or intellectual creator, in German law, were partly rights of copyright. But they also were beginning to extend

137. *See* James Q. Whitman, *At the Origins of Law and the State: Supervision of Violence, Mutilation of Bodies, or Setting of Prices?*, 71 CHI.-KENT L. REV. 41, 58-68 (1995).

138. RUDOLPH VON JHERING, GEIST DES RÖMISCHEN RECHTS AUF DEN VERSCHIEDENEN STUFEN SEINER ENTWICKLUNG (Leipzig, Breitkopf und Härtel 5th ed. 1891).

139. JHERING, *supra* note 136, at 235.

140. *Id.* at 236.

141. *Id.* at 390-96.

142. *Id.* at 383-84, 389-90.

143. *Id.* at 385-89.

144. *Id.* at 344-45.

145. For a parallel effort focused more on Germanic sources, see 3 OTTO VON GIERKE, DEUTSCHES PRIVATRECHT 958-63 (1917).

beyond mere copyright to include a broader right to control the use of one's work, in the name of protecting one's reputation as an artist—what in continental law is today called "droit moral de l'auteur."[146] For German scholars who thought of "personality" as the right to free self-creation, the law of artistic and intellectual property was a natural source, to be exploited alongside the law of insult.[147] After all, personality was precisely about self-*creation*. And of course, protection of the creative rights of the artist, a nineteenth-century innovation, was a classic example of the new modern sensitivity to immaterial interests.

The law of insult, united with the law of artistic creation, thus made for what seemed to Germans a solid foundation for a law of personality. The idea that personality was really about an amalgam of personal honor and artists' rights was popularized beginning in the late 1870s by an influential writer named Karl Gareis.[148] Related approaches were developed in particular by the most deeply learned and intellectually adventurous of turn-of-the-century legal thinkers, Josef Kohler.[149] Some important cases came into this German line of thinking as well: In particular, there was a case that prohibited the distribution of photographs of Otto von Bismarck on his deathbed.[150] As always in the continental tradition, the hunger of the press for images of highly placed persons drove the law onward.

These were very influential ideas in the developing German social order of the late nineteenth century. By the early twentieth century, German law had incorporated a wide variety of personality rights into its statutory

146. For codification of this concept, see C. PROP. INTELL. art. 121-1 (Fr.). For discussion of this concept, see Jill R. Applebaum, Comment, *The Visual Artists Rights Act of 1990: An Analysis Based on the French Droit Moral*, 8 AM. U. J. INT'L L. & POL'Y 183 (1992); and Russell J. DaSilva, *Droit Moral and the Amoral Copyright: A Comparison of Artists' Rights in France and the United States*, 28 BULL. COPYRIGHT SOC'Y 1 (1980).

147. *See* 1 VON GIERKE, *supra* note 145, at 748-848; *id.* at 764 ("Das Urheberrecht ist . . . in seinem ganzen Umfange als ein aus geistiger Schöpfung fliessendes *Persönlichkeitsrecht* zu konstruiren." (emphasis added)). Otto von Gierke drew on J. KOHLER, DAS AUTORRECHT: EINE ZIVILISTISCHE ABHANDLUNG (Jena, Fischer 1880) [hereinafter KOHLER, DAS AUTORRECHT]. Kohler was, however, critical of Gierke's approach. *See* J. Kohler, *Zur Konstruktion des Urheberrechts*, 10 ARCHIV FÜR BÜRGERLICHES RECHT 241, 246-58 (1895). Moreover, there was much dispute during the nineteenth century over whether rights in works of art should be understood as an aspect of the protection of personality or not. For a rapid survey of theories predating the triumph of the "personality" analysis, see OSTERRIETH, *supra* note 80, at 5-7.

148. For more on the writing and role of Gareis, see DIETER LEUZE, DIE ENTWICKLUNG DES PERSÖNLICHKEITSRECHTS IM XIX JAHRHUNDERT 93-103 (1962).

149. *See* KOHLER, DAS AUTORRECHT, *supra* note 147, at 123-59; *id.* at 126 (using the term "Persönlichkeit"). For more on Kohler, see LEUZE, *supra* note 148, at 103-11. In his mature reflections, Kohler in effect rejected both Roman and Germanic approaches in ways that deserve more discussion than I can give them here. *See, e.g.*, KOHLER, *supra* note 42.

150. The famous Bismarck case was preceded by a couple of other photography cases, involving a woman in a bathing suit and a photograph used to advertise a hair dye. But it was the Bismarck matter that really caught the public imagination in Germany. *See* OSTERRIETH, *supra* note 80, at 161 (describing the origins of the protections for one's image contained in §§ 22-24 KUG). Osterrieth also mentions protections for portraits and portrait busts—but just for those who ordered the work in question, not for those portrayed.

schemes. The scandal over Bismarck's deathbed photos led, in 1907, to the introduction of statutory protections for one's image, as part of a larger scheme regulating rights in works of art.[151] Meanwhile, the German Civil Code, which went into force in 1900, included protections against the appropriation of one's name[152] and the impairment of one's credit,[153] alongside protections for life, body, health, and liberty.[154] The 1909 law on unfair competition included a characteristically German provision protecting enterprises against untrue statements that harmed their operations or their credit,[155] and the Bismarck-era law on freedom of the press granted a right to respond.[156] Perhaps most importantly, the Criminal Code included a prohibition on insults.[157] All of this added up to protections that were hardly insignificant by the eve of World War I. The Weimar era saw a number of further important cases, particularly involving members of the formerly imperial Hohenzollern family and like personages.[158]

In short, there were plenty of "personality" protections in German law by the early part of the twentieth century. Nevertheless, the Civil Code itself, which went into force in 1900, did not endorse an unbounded right of personality[159]—much to the dismay of many legal scholars. Indeed, it is an important part of German legal lore that personality was neglected in the Civil Code. This peculiarly German form of freedom, German lore tells us, was not embraced by the Code, which instead endorsed crassly market-oriented values.[160] The German literature routinely declares that personality was only fully protected in the 1950s, as a consequence of the new commitment to freedom and dignity that took hold in the wake of Nazism.

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151. Failure to protect the image, the official government draft for this law explained, would not do justice to "the respect which is owed to the personality." Regierungsvorlage §§ 22-24 KUG, *reprinted in* OSTERRIETH, *supra* note 80, at 161. The image needed to be protected in a way that would "leave freedom of movement for the respectable press, without leaving justifiable private interests without protection." OSTERRIETH, *supra* note 80, at 163.

152. § 12 BGB.

153. *Id.* § 824, para. 1.

154. *Id.* § 823, para. 1.

155. § 14, para. 1 GESETZ GEGEN DEN UNLAUTEREN WETTBEWERB.

156. § 11, paras. 1-3 REICHSPRESSEGESETZ.

157. § 185 STRAFGESETZBUCH. For a view of these provisions as forerunners of developed German *Persönlichkeitsrecht*, see von Caemmerer, *supra* note 126, at 102-03.

158. For a summary of these cases, see ALEXANDER ELSTER, URHEBER—UND ERFINDER-WARENZEICHEN—UND WETTBEWERBSRECHT 191-92 (2d ed. 1928). Royalty were not the only ones protected, though. For a case involving a typist, from whose life episodes were lifted by a novelist, see *Nichtanerkennung des allgemeinen Persönlichkeitsrechts*, 4 UFITA ARCHIV FÜR URHEBER-, FILM-, FUNK- UND THEATERRECHT 319, 319-23 (1931). One is tempted to think of this case as foreshadowing the social extension of protections during the Nazi period. In his account of the period, Stefan Gottwald emphasizes economic interests more than I do here. *See* GOTTWALD, *supra* note 83, at 14-46.

159. The Civil Code was decisively so interpreted in Entscheidungen des Reichsgerichts in Zivilsachen 51, 373.

160. For a sensitive presentation of this position, see Helmut Coing, *Zur Entwicklung des zivilrechtlichen Persönlichkeitsschutzes*, 1958 JURISTENZEITUNG 558, 559.

Indeed, the protection of personality is widely presented as the core institution of a German private law shaped by the reaction against Nazism—"one of the most essential achievements," as a standard textbook says, "of the post-war period."[161]

This is not, however, correct. With this we come to a delicate point, which I have touched on before and now must touch on again. Here, as elsewhere, contemporary German institutions of dignity have a Nazi history. In point of fact, the Nazis too were committed to the protection of personality.[162] This German form of freedom was one that appealed to the Nazis just as it appealed to the later makers of the twentieth-century social welfare state. The story is entirely typical of the history I have recounted elsewhere.[163] The Nazi regime, like other fascist regimes, made great efforts to proclaim the importance of "honor"—and most especially the importance of the honor of low-status persons, as long as they were racially German. This led the regime to insist on norms of respect for workers in the workplace, and in everyday life as well.[164] In just the same way, it led the regime to insist that all Germans, whatever their social station, had a right to the protection of their personality. Otto Palandt's standard commentary to the Civil Code explained it this way in the early 1940s:

> The "right of personality" did not receive any definitive regulation in the Civil Code. Life, body, health, and freedom are protected through § 823 I, and so is the right to one's name . . . . A general right of personality is alien to the Civil Code. However, there is nothing in the Code that excludes it. National Socialist legal feeling [*National-sozialistisches Rechtsempfinden*] regards the *Volk*-comrade as a member of the *Volk* community, who fulfills the demands of his legal position in the service of the *Volk* community, and who as such has a claim that the legal position that has been conferred upon him be safeguarded and protected against attacks of any kind. In this sense, it can be said that the *Volk*-comrade has a general right of personality that ought to be recognized, one whose content extends beyond the above-mentioned personality interests

161. CLAUS AHRENS, PERSÖNLICHKEITSRECHT UND FREIHEIT DER MEDIENBERICHTERSTATTUNG 28 (2002). This commonplace view can now be found in almost any comparative law text. *See, e.g.*, UGO MATTEI, COMPARATIVE LAW AND ECONOMICS 115-16 (1997). For a typical account of constitutional development after the war, see Hans D. Jarass, *Die Entwicklung des allgemeinen Persönlichkeitsrechts in der Rechtsprechung des Bundesverfassungsgerichts*, *in* RECHT DER PERSÖNLICHKEIT, *supra* note 76, at 89, 89-103.

162. This remains an unwritten chapter of German legal history, outside a brief but valuable discussion by Gottwald. *See* GOTTWALD, *supra* note 83, at 47-58. Broadly speaking, Nazi writers tended to promise protection of the "Ehre" of ordinary Germans as a kind of exchange for their submission to the demands of the "folk community." *See, e.g.*, JUSTUS WILHELM HEDEMANN, DAS VOLKSGESETZBUCH DER DEUTSCHEN: EIN BERICHT 37 (1941).

163. *See* WHITMAN, *supra* note 55, at 140-41; Whitman, *supra* note 42, at 1325-30; Whitman, *supra* note 60, at 243-66.

164. Whitman, *supra* note 42, at 1327-30; Whitman, *supra* note 60, at 251-62.

> listed [in the Code], including in particular a right to join in the common labor of the community and a right to recognition, respect, and honor . . . .[165]

The draft Nazi Civil Code, never enacted, was even more assertive in its insistence on a universal German right to protection of personality.[166] The Nazis presented themselves as protecting honor to its fullest extent, in return for the sacrifices demanded of the German *Volk*. Of course the insistence on honor for *Germans* was paired with an insistence on the dishonor of others—of persons who were "sick or foreign."[167] Like all Nazi extensions of "honor" to the lower orders, this too belonged to the politics of the most vicious kind of exclusion. It is for that very reason that the rare historian who deigns even to talk about the Nazi period insists that there is no connection between Nazi ideas and the doctrines of the postwar period.[168] Nevertheless, it is much too simple to dismiss the Nazi experience as a rejection of the traditions of German personality law—whether we are talking about the history of legal doctrine, or about the social history of the law. As a matter of doctrine, the Nazis *did* endorse the general right of personality. As a matter of social history, the Nazis did guarantee, here as elsewhere, the claim to honor of low-status Germans. Ordinary Germans who would come to pride themselves on their "dignity" in the 1950s and 1960s were Germans who had been taught to pride themselves on their "honor" twenty years earlier.

The consequence, painful as it is to acknowledge, is that Nazi law directly prefigured the law of postwar Germany. By the 1950s and 1960s, to be sure, the standard commentary to the Civil Code was no longer grounding the "general right of personality" in "National Socialist legal feeling" and the requirement that the "*Volk*-comrade" work for and with the

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165. From Palandt's original text:

> Das "Recht der Persönlichkeit" hat im BGB keine abschließende Regelung gefunden. Leben, Körper, Gesundheit und Freiheit werden durch § 823 I geschützt, ebenso das Namensrecht . . . . Ein allgemein[es] Persönlichkeitsrecht ist dem BGB fremd, RG 51, 376. Es ist aber durch keine Bestimmung ausgeschlossen. Nat[ional]-soz[ialistisches] Rechtsempfinden sieht im Volksgenossen ein Glied der Volksgemeinschaft, das seine Rechtsstellung in deren Dienste auszfüllen hat und als solches Anspruch darauf hat, daß die ihm übertragene Rechtsstellung gewährleistet und gegen Angriffe jeder Art geschützt werde. In diesem Sinne dürfte heute ein allgemein[es] Persönlichkeitsrecht des Volksgenossen anzuerkennen sein (anders noch RG 113, 414, RAG, 33, 1911), dessen Inhalt über den Schutz der im Gesetz aufgeführten obengenannten Persönlichkeitsgüter hinausgeht, und insbes. ein Recht auf Mitarbeit im Rahmen der Gemeinschaft und auf Anerkennung, Achtung und Ehre . . . .

Otto Palandt, *Einführung vor § 1*, *in* BGB 4, 4 abs. 2 (Otto Palandt ed., 6th ed. 1944).

166. JUSTUS WILHEM HEDEMANN, VOLKSGESETZBUCH: GRUNDREGELN UND BUCH I, at 15-20 (1942).

167. HEINZ HERMANN, DAS ALLGEMEINE PERSÖNLICHKEITSRECHT 35 (1935).

168. *See, e.g.*, Hans Hattenhauer, *"Person"—Zur Geschichte eines Begriffs*, 22 JURISTISCHE SCHULUNG 410 (1982).

community, as it had done in the 1940s. Instead it was (rather reluctantly) grounding it in the constitutional right to "free self-realization."[169] But in both eras, the commentary talked a lot about "honor,"[170] and the net result was that the German civil law acknowledged a "general personality right" in each. In point of fact, the protection of personality is not a product of postwar reforms, as German scholars must have known perfectly well during the 1950s.[171] It has grown in tandem with the German social welfare state, and the downward social extension of a claim to honor, throughout the twentieth century.

Be that as it may, the protection of personality has especially flourished since the 1950s. The Basic Law of 1949 did embrace the German tradition of personality protection in its famous Article II, which guarantees that "[e]very person has the right to free development of his personality, insofar as he does not injure the rights of others."[172] This was a forceful restatement of the German idea of freedom. In subsequent years, Article II has indeed come to stand at the foundation of the extensive German protection of privacy, among other personality interests. A number of cases of the 1950s established the principle that the Civil Code had to be understood in light of this constitutional provision, as guaranteeing a right to the protection of personality.[173] The postwar law of personality is now a central institution of German dignity in the (perhaps endangered) world of German market socialism.

VI. CONTEMPORARY CONTINENTAL LAW: PROTECTING THE AVERAGE PERSON'S PUBLIC IMAGE

The old traditions described above have remained strong down to the present postwar day, in both Germany and France. Postwar developments were more tentative in France than in Germany. Protections for "privacy" were proclaimed by de Gaulle's government in exile shortly before D-Day,

169. The Palandt commentary was slow to accept the new doctrine on Persönlichkeitsschutz. *Compare* PALANDT BÜRGERLICHES GESETZBUCH § 823(6)(i), at 680 (Bernhard Danckelmann et al. eds., 16th ed. 1957) (finding that the new doctrine goes too far), *with* PALANDT BÜRGERLICHES GESETZBUCH § 823(6)(i), at 702 (Bernhard Danckelmann et al. eds., 28th ed. 1969) [hereinafter PALANDT BÜRGERLICHES GESETZBUCH 1969] (adopting the "herrschende Meinung"—the accepted general opinion of scholars). For an important revisionist account of this period, arguing that the rise of the new doctrine was intended to protect ex-Nazis, see GOTTWALD, *supra* note 83, at 59-124.

170. PALANDT BÜRGERLICHES GESETZBUCH 1969, *supra* note 169, § 823(6)(i), at 702; Palandt, *supra* note 165, at 4.

171. Palandt himself, it should be noted, died in 1951. For a brief biography, see Klaus W. Slapnicar, Palandts langer Schatten: Biographisches über einen bekannten Fremden, http://www.vfh-hessen.de/ftp/Spectrum/2003-1-Palandt-Slapnicar.pdf (last visited Nov. 3, 2003).

172. GRUNDGESETZ [Constitution] art. 2, para. 1.

173. For a discussion of some of these cases in English, see EBERLE, *supra* note 42, at 25-35, 62-72, 98-99.

presumably in the effort to win over former collaborators.[174] Nevertheless, lasting change had to wait until 1970, when the Civil Code was amended to introduce new protections.[175] Still, today protections for privacy are a proud part of the law in both countries—and in both, they have retained much of their nineteenth-century coloration.[176] To be sure, the law of privacy in both countries is today regarded as distinct from the law of insult.[177] Nevertheless, traditional nineteenth-century values, with their honor-oriented, suspicious attitude toward the free press and the free market, have continued to make themselves felt, even in a world in which the privacy of ordinary folks is vigorously protected.

The continental chariness about the free market shows, for example, in the treatment of consumer credit reporting and other consumer data. Credit reporting is an especially revealing example. Here the basic continental rules grow out of longstanding continental traditions. Historically, as a matter of etiquette, one's financial affairs were very much one's own affairs. One did not talk about money matters unless absolutely necessary: Indeed, money, as a standard etiquette guide will tell you, was simply "a taboo subject" among respectable people.[178] The only persons whose finances were routinely revealed to the public were insolvents and bankrupts. That attitude has had a marked influence on European privacy law—most notably in the traditional French rule that made it a per se violation of privacy rights to reveal another person's salary.[179] (Indeed, a French text on the law of privacy will still casually list "health, love, sex and earnings" as the areas of life self-evidently in need of privacy protections.)[180]

The same attitude has had an influence on the continental law of credit reporting. In France in particular, consumer credit reports are provided only by official sources, and they are provided only in the case of persons experiencing serious financial difficulty. They offer, as it were, only a watch list of persons who are proven credit risks. Anything else, to the French mind, would represent an intrusion into financial privacy.[181] One's

174. Ordinance of May 6, 1944, J.O., May 20, 1944, p. 418; Gaz. Pal. 1944, 2, pan. jurispr. 292 (amending Law No. 637 of July 29, 1881, J.O., July 30, 1881, p. 125; D.P. 1881, IV, p. 65). For the limited impact on postwar law, see the discussion of Robert Badinter, *Le droit au respect de la vie privée*, JCP 1968 no.2136. Nevertheless, it is striking how infrequently this *ordonnance* is mentioned in the literature.

175. CODE CIVIL [C. CIV.] art. 9.

176. For the continuing vigor of the law of insult in France, see de Lamberterie & Strubel, *supra* note 44, at 356.

177. BERTRAND, *supra* note 10, at 17-18.

178. LE BRAS, *supra* note 16, at 66.

179. This rule has been shaken somewhat in recent years. *See* BEIGNIER, *supra* note 42, at 57-58; BERTRAND, *supra* note 10, at 93-98.

180. BERTRAND, *supra* note 10, at 15.

181. This footnote is excerpted from a memorandum prepared by Agnès Dunogué, my research assistant. In France, the Commission Nationale de l'Informatique et des Libertés (CNIL)

financial information is information "of a personal character," over which one must have control just as one must have control over one's image.[182]

The German approach is less directly interventionist. Credit reporting is provided not by government agencies, but by industry collectives known as "Schufas." Even in Germany, though, there is significant regulation: Consumers must sign a contractual clause expressly permitting lenders to share data about them, and before any data is shared, the law requires a careful balancing of the privacy interest of consumers against the interests of financial entities, theoretically in every individual case. As in France, moreover, German reporting focuses on classic sorts of negative information associated with insolvency and default.[183] European credit reporting is thus the direct descendant of the old European law of bankruptcy: It is law that stigmatizes the dishonorable failure to pay one's debts, not law that allows merchants to pry into the buying habits of

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is the administrative agency charged with protecting individuals' privacy, particularly in the context of computers and data processing, and ensuring that the relevant laws are enforced. *See* Commission Nationale de l'Informatique et des Libertés, *at* http://www.cnil.fr (last visited Nov. 11, 2003). Financial institutions and specialized credit providers are subject to the CNIL's rules and supervision with regard to data processing. The creation and sharing of files containing what is referred to as "positive" and "nominative" data about consumers (i.e., personally identifiable information detailing account activity) is prohibited. Therefore, credit bureaus and credit reporting agencies (as they are known in the United States) do not currently exist in France. In order to collect and process personal data, approval from the CNIL must be obtained (in the form of what is referred to as a "récépissé"). *See* Délibération No. 87-025 of Feb. 10, 1987, JCP 1987, III, 59910 (reflecting the original version, which has since been amended three times).

What do exist in France, however, are accessible files containing "negative" credit information, that is, information about consumers who have defaulted on their payments. The Banque de France maintains a "Fichier National des Incidents de Remboursement des Crédits aux Particuliers" (FICP). Credit providers (such as banks or specialized companies) populate this database with information about individuals who have defaulted on credit payments (according to different rules depending on the type of credit account—for example, when a payment is not made for over ninety days after the due date for accounts that are not on a monthly payment plan). For more information, see BANQUE DE FRANCE, NOTE D'INFORMATION NO. 129: LE FICHER NATIONAL DES INCIDENTS DE REMBOURSEMENT DES CRÉDITS AUX PARTICULIERS (2002), *at* http://www.banque-france.fr/fr/telechar/2002/note129.pdf. This database is accessible by all credit institutions established in France. If an individual is in the FICP, he or she will likely not be given credit again. The purpose of this database is to fight against "surendettement" (excessive debt).

182. *See, e.g.*, SANDRA DE FAULTRIER-TRAVERS, ASPECTS JURIDIQUES DE L'INFORMATION 53-55 (1991) (explaining that financial information is information "à caractère personnel"); *id.* at 51-53 (discussing the right to one's image).

183. *See generally* HANS-JÜRGEN SCHAFFLAND & NOEME WILTFANG, BUNDESDATENSCHUTZGESETZ (BDSG): ERGENZBÄRER KOMMENTAR NEBST EINSCHLÄGIGEN RECHTSVORSCHRIFTEN § 29, paras. 17-18, at 6-7 (2000) (noting that a weighing of interests must be done for each individual case); *id.* para. 27, at 11 (noting reluctance to include "positive" data). The so-called "SCHUFA-Klauseln," the agreements to permit banks and other financial institutions to share information, are familiar to all Germans. *See id.* apps. 2-4 (reproducing the agreements). For the development of the German norms, see Dieter Ungnade & Franz Josef Gorynia, *Datenschutz und Kreditgewerbe*, *in* ZEITSCHRIFT FÜR WIRTSCHAFTS- UND BANKRECHT (Sonderbeilage Nr. 7/1983, Wertpapier-Mitteilungen Teil IV). *See also* Ulrich Wuermeling, *Scoring von Kreditrisken*, 55 N.J.W. 3508 (2002). Credit scoring is provided only through statistical aggregation of anonymized data, in order to prevent violations of the privacy rights of individual consumers.

honorable, solvent persons. Certainly anything like the American practice of compiling an accessible record of any individual's credit history seems like a dangerous exposure of private life to most Europeans.

All very continental—but at what cost? As any American law professor will surmise, it inevitably means that consumer credit is less easily available in continental Europe than it is in the United States. Indeed, these privacy norms must contribute significantly to the making of a continental world in which credit cards have made much slower progress than they have in the United States—a world that in general is not founded on the system of consumer credit. It may be difficult for Americans to understand why continental Europeans should resist our well-developed credit-reporting practices. In the long run, good credit reporting ought to make life easier for everybody, and indeed make everybody richer. But, for the continental legal tradition, the basic issue is of course not just one of market efficiency. Consumers need more than credit. They need dignity. The idea that any random merchant might have access to the "image" of your financial history is simply too intuitively distasteful to people brought up in the continental world.

The protection of consumer data reflects in many ways the same clash of attitudes. Europeans have aggressively condemned traffic in consumer data: It is, European lawyers believe, a serious potential violation of the privacy rights of the consumer if marketers can purchase data about his or her preferences, and regulation is thus imperative. The resulting protections are embodied in the European Commission's forceful Privacy Directive of 1995,[184] under which Europeans claim the authority, as the *Wall Street Journal* puts it, to play "Privacy Cop to the World."[185] Americans have of course been much slower and more hesitant to regulate, with the resulting battles that I have already described.[186] And indeed, the continental attitude is not easy for Americans to understand. After all, there *is* a benefit in the traffic in consumer data. If marketers can learn more easily what my preferences are, they can provide me more easily with the goods and services I seek. To put it in the language of American law and economics, trafficking in consumer data lowers search costs: It makes it easier for buyers and sellers to find each other, creating sales that would otherwise not have been made, and thereby enhances the efficiency of the market.[187]

Not all Americans would approve of the theories of law and economics, of course. Nevertheless, on some level, the relaxed attitude of law-and-

184. For the text of the directive, see Data Privacy Directive, *supra* note 24.

185. Scheer, *supra* note 25.

186. *See supra* notes 24-25 and accompanying text.

187. For an amusing review of one new technology tracking consumer preferences in ways that some consumers reject, but others value (among them the author of this Article), see Jeffrey Zaslow, *If Tivo Thinks You're Gay, Here's How To Set It Straight*, WALL ST. J., Nov. 26, 2002, at A1.

economics scholars toward the market is clearly widely shared among American policymakers. This does not mean that Americans do not experience some anxiety about the traffic in their "private" information. But it does mean that American law has been far less categorical in its condemnations than European law. Whereas European law allows the collection of consumer data only for limited purposes and limited times, upon explicit consent of the affected person, and under government supervision,[188] Americans are much more willing to tolerate industry self-regulation.[189] Most of all, when they do propose regulation, they tend, in a characteristically American way, to favor "market-based solutions to personal data protection," as Pamela Samuelson writes, "over the strict comprehensive regulatory regime adopted . . . in Europe."[190]

Indeed. Europeans have a harder time seeing the benefits of free-market solutions. As another leading scholar puts it, Europeans "trust government more than the private sector with personal information."[191] Why is this? It is not hard to understand if we keep in mind the continental traditions I have described. Privacy is an aspect of personal dignity within the continental tradition, and personal dignity is never satisfactorily safeguarded by market mechanisms. Ever since the case of Dumas père, continental law has resisted the notion that one can definitively alienate one's "dignity."[192] Dignity, to this way of thinking, simply must be treated differently from property. As one French scholar insists, contrasting the American attitude with the French, one can freely dispose of one's liberty, but one can never be permitted to freely dispose of one's dignity.[193] If one accepts that premise, one should accept the proposition that any consumer's consent to the sale of his or her data should have only limited effect at best. After all, "the importance of one's image," as a recent French article puts it, is greater than ever "in the information society."[194]

Here again, consumers need more than cheap goods and services, just as they need more than easy credit. They need dignity. If your consumer profile is floating around somewhere in cyberspace, you are not in control

188. Data Privacy Directive, *supra* note 24, arts. 6(1)(b)-(c), (e), 7(a), 1995 O.J. (L 281) at 40.

189. Scheer, *supra* note 25.

190. Pamela Samuelson, *Privacy as Intellectual Property?*, 52 STAN. L. REV. 1125, 1127-28 (2000). For Americans skeptical of such market solutions, see Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 STAN. L. REV. 1373 (2000); and Paul M. Schwartz, *Privacy and Democracy in Cyberspace*, 52 VAND. L. REV. 1609 (1999).

191. Joel R. Reidenberg, *E-Commerce and Trans-Atlantic Privacy*, 38 HOUS. L. REV. 717, 731 (2001).

192. For limitations on such alienation in German law, see OSTERRIETH, *supra* note 80, at 168-69.

193. BEIGNIER, *supra* note 42, at 61. Bernard Beignier, I should note, would not accept my account here, since he places his emphasis much more on traditional postwar notions of human dignity.

194. De Lamberterie & Strubel, *supra* note 44, at 374.

of your image. A just world, from this point of view, is a world in which everybody's respectability is carefully protected.[195] This sort of thinking has far less resonance in America than it does in Germany and France. We will never quite share the intuitions that fuel the continental conviction that trading in consumer data *must* be prevented, or at least sharply limited by law.

As these examples suggest, continental privacy is not just for Princess Caroline, Princess Soraya, or Prince Ernst August. It is for the ordinary person as well, in his or her guise as consumer. It is also for the ordinary person in his or her guise as worker. Continental law has made considerable efforts to guarantee the privacy of workers in the workplace, at least within the limits of the possible.[196] Worker e-mails, for example, are vigorously protected in a way that is not the case in America.[197] There are protections for workers' other private documents, guarantees against video surveillance, and rights to use telephones for personal calls—all in the name of maintaining a certain "personal sphere."[198] It goes well beyond e-mails and the like, too, to cover a wide range of issues touching questions of workplace dignity. One striking French decision, for example, found it a violation of dignity rights when an employer in a retail store required that employees show a receipt for merchandise that they wished to take home. Treating workers with that sort of suspiciousness was regarded by the court as a violation of their expectation to be treated as honorable persons.[199]

The contrast with American approaches to the workplace is telling. American privacy protections, at their metaphoric core, are the sorts of protections afforded by the walls of one's home. They have been extended beyond the literal home, of course, since the eighteenth century. Nevertheless, it remains the case that American protections become progressively weaker the further the affected person is from home. This is particularly true when courts apply the "reasonable expectation of privacy" test developed in the Fourth Amendment context.[200] The primary locus of one's "reasonable expectation of privacy" is of course in the home, and persons outside the home have correspondingly few privacy protections.

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195. Thus, "information professionals" (i.e., journalists) are subject under French law to an obligation of "objectivity," which is part of the right to one's image. *See* LAURE MARINO, RESPONSABILITÉ CIVILE ACTIVITÉ D'INFORMATION ET MÉDIAS 145-94 (1997); de Lamberterie & Strubel, *supra* note 44, at 357-58.

196. BERTRAND, *supra* note 10, at 111-22; Manfred Weiss & Barbara Geck, *Worker Privacy in Germany*, 17 COMP. LAB. L.J. 75 (1995). For a detailed contrast between German and American approaches, see Matthew W. Finkin, *Menschenbild: The Conception of the Employee as a Person in Western Law*, 23 COMP. LAB. L. & POL'Y J. 577 (2002). *See also* Friedman & Whitman, *supra* note 54, at 357-58.

197. *See* Bourrie-Quenillet & Rodhain, *supra* note 29.

198. BERTRAND, *supra* note 10, at 117-22.

199. *See* Friedman & Whitman, *supra* note 54, at 260.

200. *See* O'Connor v. Ortega, 480 U.S. 709 (1987) (applying a "reasonable expectation of privacy" test in determining whether a workplace search was constitutional).

This applies to workers as well, whose expectation of privacy in the workplace, according to the American cases, is sometimes close to nil.[201]

The same contrast holds in one of the most striking aspects of the comparative law of privacy: the treatment of criminal offenders, including accused persons and prison inmates. Continental privacy protections extend to these classes of persons as well. Continental privacy law has been strongly concerned with the privacy rights of persons caught up in the toils of the justice system. In Germany, modern personality protection grows preeminently out of a 1976 case involving a homosexual prison inmate convicted of an act of terrorism.[202] In that case, *Lebach*, the German Constitutional Court found that it would be a violation of the inmate's personality rights to broadcast a made-for-television movie about him. *Lebach* has been regarded since as the font of late-twentieth-century personality doctrine. French law too has made strong efforts to guarantee the privacy of accused persons as a fundamental aspect of the presumption of innocence,[203] and more broadly of the "honorability" of the accused.[204] In line with this, both Germany and France make considerable efforts to guarantee that prison inmates will enjoy protections for their privacy, in ways that are unimaginable for Americans.[205] All persons haled into the criminal justice system enjoy, at least in principle, protections that are not available to their American counterparts.

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201. *E.g.*, Thompson v. Johnson County Cmty. Coll., 930 F. Supp. 501 (D. Kan. 1996), *aff'd*, 108 F.3d 1388 (10th Cir. 1997) (unpublished table decision).

202. BVerfGE 35, 202. On *Lebach*, see MEDIENWIRKUNG UND MEDIENVERANTWORTUNG (Friedrich Kübler ed., 1975). The *Lebach* doctrine has now been altered somewhat by the so-called *Lebach II* decision. BVerfG, 1 BvR 348/98, 1 BvR 755/98, v. 25.11.1999. These are not mechanically applied principles, of course. *See, e.g.*, Walter Seitz, *Einmal Nackt—Immer Frei?*, 55 N.J.W. 3231 (2002) (noting that a dossier compiled during an investigation may be kept even after the acquittal of the defendant under some circumstances). For a survey of the current state of German law with regard to the accused at trial, see § 169, paras. 14-20, 26 GERICHTSVERFASSUNGSGESETZ (Otto Kissel ed., 3d ed. 2001) (discussing the dangers of exposure for the accused); *id.* § 169, paras. 85-93 (discussing press coverage); *id.* §§ 171a-171b (discussing the closing of trials, in part in order to protect privacy). Germans feel the tension between the imperative of the public openness of the courts and the need for the protection of personality quite acutely. *See* Bodo Pieroth, *Gerichtsöffentlichkeit und Persönlichkeitsschutz*, *in* RECHT DER PERSÖNLICHKEIT, *supra* note 76, at 249. For the law of press reporting, which certainly does leave room for much detailed publication—as readers of German newspapers will know—see also KARL EGBERT WENZEL, DAS RECHT DER WORT- UND BILDBERICHTERSTATTUNG 448-49 (4th rev. ed. 1994).

203. C. CIV. art. 9-1 (amended 1992). For a fuller account, see PIERRE KAYSER, LA PROTECTION DE LA VIE PRIVÉE PAR LE DROIT: PROTECTION DU SECRET DE LA VIE PRIVÉE 173-75 (3d ed. 1995).

204. Jean Dematteis & Nadein Poulet-Gibot Leclerc, *Peut-on Supprimer l'Article 11 du Code de Procédure Pénale relatif au secret de l'instruction?*, JCP, Oct. 9, 2002, LEXIS, Nexis Library, La Semaine Juridique, édition générale File. This article describes the real tension between the ideal of the "honorability" of the accused and the ideal of freedom of the press. *Cf.* Paul v. Davis, 424 U.S. 693 (1976) (demonstrating the contrary approach of U.S. law by permitting the public posting of a photograph of an "active shoplifter" against whom charges had been dropped).

205. *See* WHITMAN, *supra* note 55, at 84-92. For German debates on whether guards must always knock before entering a prisoner's cell, see *id.* at 90.

VII. CONTEMPORARY CONTINENTAL LAW: FREE EXPRESSION AND PUBLIC NUDITY

Differences in cultural tradition, in short, have made for palpable differences in law. The differences are most striking, and most categorical, where the values of free speech are involved. Here it is above all the classic problems of privacy law—sex and nudity—that provide the most revealing examples. They are my topic in this last Part discussing continental law.

With regard to France, some of the striking contrasts in the law were traced by Jeanne Hauch in a 1994 article with the wonderful title *Protecting Private Facts in France: The Warren & Brandeis Tort Is Alive and Well and Flourishing in Paris*.[206] Hauch offers, among others, the example of Oliver Sipple.[207] Sipple was the unfortunate man who thwarted the attempt of Sara Jane Moore to assassinate President Gerald Ford. He was homosexual—a fact that he very much wanted kept out of the press. This proved to be impossible under the American law of "public figures." Of course, in any democracy the private doings of at least some public figures are a matter of legitimate public interest, and every democratic system recognizes that.[208] Since the 1960s, though, the American "newsworthiness" exception has grown mightily, and peculiarly, in scope.[209] Freedom of expression is a value of constitutional magnitude in the United States, whereas the protection of personal honor is not, which means that freedom of expression almost always wins out. That is what doomed Oliver Sipple's effort to keep his homosexuality out of the papers. Although Sipple's entry into the public eye was the result only of his heroism in a moment of danger, the California Court of Appeal held that there was a legitimate public interest in his private life. In any case, the court held, "he did not make a secret" of his sexual orientation, at least in San Francisco.[210] Sipple (whose family in the Midwest had known nothing of his California life) eventually committed suicide.[211]

206. Jeanne M. Hauch, *Protecting Private Facts in France: The Warren & Brandeis Tort Is Alive and Well and Flourishing in Paris*, 68 TUL. L. REV. 1219 (1994).

207. *Id.* at 1220, 1263 n.217.

208. For a summary of such recognitions in Germany, see § 23 KUG, *amended by* Gesetz, v. 22.2.2001 art. 3, § 31 (BGBl. I S.280). *See also, e.g.*, SOEHRING, *supra* note 79, at 427-28, 434-37.

209. *See* Harry Kalven, Jr., *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326, 335-38 (1966) (noting what has been a spiraling growth in the newsworthiness exception ever since Warren and Brandeis's article was published).

210. Sipple v. Chronicle Publ'g Co., 201 Cal. Rptr. 665, 669 (Ct. App. 1984). An example frequently paired with this case is *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222 (7th Cir. 1993), in which the court held that the publication of arguably embarrassing facts about the plaintiff did not constitute libel.

211. ROSEN, *supra* note 46, at 48.

It is precisely cases like this that Europeans see differently. The right of free expression that protects the press is always balanced in continental Europe against an individual right to "dignity," "honor," or "personality,"[212] which implies a right to personal privacy—as was shown by a 1985 French case that Hauch uses as a foil to the *Sipple* decision.[213] The case involved a man who attended a gay pride parade in Paris, dressed in a way that made it clear that he was himself gay. His image was captured in a news photo. Continental law has long held that persons appearing in public may be photographed, but that no photograph may be published that focuses on them as individuals, unless they consent. Moreover, to the French way of thinking, the fact that one has revealed oneself to a restricted public—say, the gay community of Paris—does not imply that one has lost all protections before the larger public. These principles matter, and the French court accordingly acknowledged the plaintiff's right to oppose publication of his image.[214]

The contrast between the treatment of Sipple and the treatment of this French victim of publicity is typical of a much deeper contrast in attitude, which one commentator on the supposed "failure" of American privacy law describes this way:

> [P]rivacy is not the only cherished American value. We also cherish information, and candour, and freedom of speech. We expect to be free to discover and discuss the secrets of our neighbours, celebrities, and public officials. We expect government to conduct its business publicly, even if that infringes the privacy of those caught up in the matter. Most of all, we expect the media to uncover the truth and report it—not merely the truth about government and public affairs, but the truth about people.
>
> The law protects these expectations too—and when they collide with expectations of privacy, privacy almost always loses.[215]

In Europe, by contrast, personal honor very often wins out. As one German author put it in 1959—a time when Germans began to reassert their own distinctive national traditions—there is simply an inevitable tension between the worldview of a Goethe, for whom the development of

212. For a survey of German approaches and problems, see AHRENS, *supra* note 161. For French approaches, with comparisons to German and American law, see LAURENT PECH, LA LIBERTÉ D'EXPRESSION ET SA LIMITATION 147-230 (2003).

213. *See* Hauch, *supra* note 206, at 1254-55.

214. CA Paris, 1e ch., June 14, 1985, D. 1986 inf. rap. 50, note R. Lindon. For discussions of the case, see BEIGNIER, *supra* note 42, at 54-55; and BERTRAND, *supra* note 10, at 92-93, 141.

215. Anderson, *supra* note 32, at 140. For a vigorous statement of this position, see Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right To Stop People from Speaking About You*, 52 STAN. L. REV. 1049 (2000).

"personality" was "the greatest blessing of the children of the earth," and the worldview of a Jefferson, for whom press liberty was the indispensable foundation of a free society.[216] Europeans are by no means completely deaf to the pleas of Jefferson, but the attitude of Goethe always haunts their thinking too. That does not mean that Europeans are doctrinaire. They have their own doctrine of "public figures." But that doctrine cuts far less deeply, as numerous cases indicate. And even when the courts allow "intrusions" into the lives of "public figures," commentators grumble.[217]

Many more examples can be offered—most especially involving nudity, and most especially involving the Internet. In German and French legal culture, we still find much the same attitude that we found in the 1877 decision regarding Ingres's nude sketch of Madame Moitessier: One ought to have control over one's nude image. This means, of course, that one can sell the rights to an image, just as one can in America[218]—at least provisionally. Nevertheless, there are limits. In one 1974 case, for example, a French actress was permitted to suppress movie scenes in which she had willingly appeared naked: One's nude image is simply not definitively alienable under continental norms.[219] In other cases, models have been able to suppress the republication of their nude photos in magazines other than the ones they posed for—a matter in which "French law," a commentator observes approvingly, "is . . . totally opposed to American law."[220] The same sort of attitude has also affected both continental cyberlaw and the continental law of public nudity. The Internet has produced two recent leading cases in particular, one in Germany and one in France, in both of which courts imposed liability on Internet service providers that housed nude images of celebrities. In the German decision, Steffi Graf, the former

216. Löffler, *Persönlichkeitsschutz und Meinungsfreiheit*, 12 N.J.W. 1 (1959).

217. In France, most recently, there is the matter of Barcia c. S.A. Groupe Express, No. 2000/14309, slip op., CA Paris, 1e ch., Sept. 20, 2001. In that case, the court allowed the publication of a photograph of the head of the French Trotskyite party, who had appeared at a funeral. For grumbling about this decision, see Bertrand Mathieu & Michel Verpeaux, *Jurisprudence Constitutionnelle*, JCP, Nov. 13, 2002, LEXIS, Nexis Library, La Semaine Juridique, édition générale File. For a German example, see the decision in the matter of the reproduction of a nude photo of Katarina Witt, published in *Playboy* magazine. The German court allowed the reproduction since it was in small format and clearly intended for purposes of satire or political commentary. OLG Frankfurt am Main, v. 21.9.1999, 11 U 28/29, 53 N.J.W. 594 (2000). For grumbling surrounding that decision, see Walter Seitz, *Einmal nackt—immer frei?*, 53 N.J.W. 2167 (2000).

218. *See, e.g.*, BEIGNIER, *supra* note 42, at 55; Bouvard, *supra* note 44, at 375-76.

219. *See* Bouvard, *supra* note 44, at 382 (discussing Laure c. VM Productions, T.G.I. Paris, Mar. 14, 1974, D. 1974, p. 766, note R. Lindon). This indeed applies in principle more generally to sales of one's image. *See* BERTRAND, *supra* note 10, at 176. For German law wrestling with the problem of the limits of the alienability of nude images, see MARTIN LÖFFLER & REINHART RICKER, HANDBUCH DES PRESSERECHTS 290-91 (2d rev. ed. 1986); *Schadensersatz für Nacktfoto im Fernsehen*, 38 N.J.W. 1617 (1985); and *Unwirksamkeit einer Einwilligung in die Anfertigung pornografischer Fotos*, 40 N.J.W. 1434 (1987).

220. BERTRAND, *supra* note 10, at 165. *See generally id.* at 163-67 (contrasting French and American law).

tennis star, successfully sued Microsoft for its refusal to guarantee that it would prevent dissemination of a "fake"—a picture of her head superimposed on the nude body of another woman.[221] The leading French case involved the model Estelle Hallyday, who similarly sued a service provider—this time a free service provider—for housing her nude image. Hallyday's suit put the provider in question out of business.[222] There have been a number of such French cases since.[223] Indeed, there has been criminal liability: One young man who published nude photos of his ex-girlfriend on the Internet (with commentary) received a suspended sentence of eight months' imprisonment and a fine of 25,000 francs—a serious sentence in France.[224] These cases do not establish an unconditional right. In particular, here again, European law does understand how to make exceptions for public figures.[225] There is no absolute control over the dissemination of one's nude image in continental law. Nevertheless, there is no doubt that the continental courts are on the watch.

The situation is different in America. Theoretically, the same rights exist in some form in American law. Nevertheless, both culture and practice differ. Congress has passed legislation that aims to forbid imposing liability on Internet service providers as such.[226] Perhaps more strikingly, unlike the European courts, American courts see little point in issuing injunctions once images have been irrevocably diffused over the Internet.[227] Such was the fate, for example, of Dr. Laura Schlessinger, a well-known conservative radio commentator, who posed for some cheesy nude photos for a man who was her boyfriend and mentor in the 1960s. In 1998, Dr. Schlessinger's (now ex-) boyfriend sold the photos to Internet Entertainment Group (IEG),

221. *See Graf Wins Suit over Fake Nude Photos*, MIAMI HERALD, May 29, 2002, *at* http://www.miami.com/mld/miamiherald/3357808.htm.

222. *See* Jean-Claude Patin, *La responsabilité des hébergeurs n°2*, CHRONIQUES JURIDIQUES JURITEL, *at* http://www.juritel.com/Liste_des_chroniques-56.html (last visited Dec. 16, 2003).

223. For another much-discussed example, consider the case of Lynda Lacoste, a French model who obtained a similar injunction when her nude image was circulated by an Internet porn outfit. S.A. Multimania Prod. c. Madame L., No. 859, CA Versailles, 12ème ch., June 8, 2000; *see also* S.A. SPPI c. Société Fox Média, No. R6: 01/04400, T.G.I. Paris, 3ème ch., May 29, 2002.

224. BERTRAND, *supra* note 10, at 127.

225. As an example, we may take a recent German case involving Katarina Witt, the ice-skating star who posed for *Playboy* magazine. The *Frankfurter Allgemeine Zeitung* was permitted to reproduce her nude photo, as long as it did so in a small format and in a context that clearly was intended to make a political statement. *See supra* note 217.

226. Communications Decency Act of 1996 § 509, 47 U.S.C. § 230(c)(1) (2000) ("No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."); *see also* Zeran v. Am. Online, Inc., 129 F.3d 327 (4th Cir. 1997) (interpreting the Act and finding no distributor liability for Internet service providers); Blumenthal v. Drudge, 992 F. Supp. 44, 49 (D.D.C. 1998) (same).

227. In describing this difference, Europeans usually refer, somewhat misleadingly, to the notorious case of the honeymoon video of Pamela Anderson Lee. *E.g.*, BERTRAND, *supra* note 10, at 163. However, that case had some peculiarities that make it, in fact, a poor example, since Lee had previously entered into a settlement that included a waiver of any right to sue. *See* David Rosenzweig, *Celebrities Lose Nude Photo Cases*, L.A. TIMES, Nov. 3, 1998, at B1.

an organization that specialized in putting exactly such nude photos of celebrities online. IEG promptly put the photos on display. Indeed, in a show of almost parodic contempt for norms of privacy, the IEG site was equipped with technology that allowed paying viewers to zoom in on any part of Dr. Schlessinger's anatomy.[228]

There is little doubt that any continental court would have enjoined an outfit like this from distributing the photos. Even in America, Dr. Schlessinger did succeed in obtaining an injunction for a time.[229] After a few weeks, though, the court lifted the injunction on the ground that the photos were already widely available on the Internet.[230] From a certain point of view, of course, the real result of Dr. Schlessinger's suit was no different from the real result in the cases of Steffi Graf or Estelle Hallyday: The curious can still find the relevant nude pictures of all of these unfortunate celebrities online. (Indeed, critics of the *Hallyday* decision loudly complained that her nude images remained available on at least twenty sites.)[231] But European courts still feel obliged to forbid the circulation of those pictures, even when it is futile to do so, in order to express the importance of protecting "private life." Moreover, European courts feel obliged to penalize the persons responsible, be they Internet service providers or delinquent ex-boyfriends.[232] American law is, our French commentator observes, "radically different."[233]

This is not, let me emphasize, because Europeans are more squeamish about nudity than Americans. Quite the contrary. Germans in particular appear fully nude in places like public parks (in the summer) and public coed saunas (in the winter) with a *sans-gêne* that Americans can hardly fathom; and French women go topless, not only on the beach, but also on the banks of the Seine. There are certainly limits: For example, one German court recently held that *jogging* in the raw went a bit too far.[234] Nevertheless, as I began by observing, it is most assuredly the Americans

228. *See* Patrizia DiLucchio, *Dr. Laura, How Could You?*, SALON.COM, Nov. 3, 1998, *at* http://archive.salon.com/21st/feature/1998/11/03feature.html.

229. *See* Rosenzweig, *supra* note 227.

230. *Id.* This follows an older line of authority in American courts. *See* Heath v. Playboy Enters., Inc., 732 F. Supp. 1145, 1148-49 (S.D. Fla. 1990) (finding that republication of facts already published cannot form the basis for an invasion of privacy claim); Ritzmann v. Weekly World News, Inc., 614 F. Supp. 1336, 1340-41 (N.D. Tex. 1985) (finding the same for a "private facts" claim).

231. *See Hébergement à Risque*, LIBÉRATION, Feb. 16, 1999, http://www.chez.com/jezequel/archives/fev99/altern.html.

232. The cultural differences may indeed run deeper than that: American celebrities—though "fakes" of many of them are to be had on the Internet too—apparently do not feel moved to sue in the way Steffi Graf did. American legal culture is just less oriented to the suppression of unauthorized nude images than is continental legal culture.

233. BERTRAND, *supra* note 10, at 168.

234. *See* Helmut Kerscher, *Richter stoppen Freiburger Nackt-Jogger*, SÜDDEUTSCHE ZEITUNG, May 11, 2000, at 7.

who are most troubled, and even put off, by nudity.[235] The difference is not that Europeans refuse to be seen nude, but that they insist that they want to be the ones who should determine when and under what circumstances they will be seen nude. The difference is that the decision to appear nude, for Europeans, belongs to *their* control of *their* image.

Indeed, even when they appear nude in public, individual Europeans have sometimes tried to claim a right not to be shown naked by the media. Scenes of naked bodies, whether on the beach or in the parks, are of course irresistibly tempting to journalists. Photographs are inevitably published, and the persons portrayed sometimes sue. Such suits are indeed the ultimate test of the continental notion that people should have absolute control over the diffusion of their image. These suits have failed in France.[236] But German courts are less categorical. Under the German law of the right to one's image, the control of pictures of the naked body belongs "exclusively to the individual."[237] This was the rule at stake in the case of a Munich man who filed suit after newspaper photos were published showing him naked in the Englischer Garten. The court took his claim seriously enough to hold that he had in principle suffered harm to his "personality" rights, though it ruled against his claim for damages. Even in ruling against his claim for damages, though, the court emphasized that his genitals were not exposed in the photo.[238] Had his genitals been exposed, the case might have come out differently.[239] The German court thus found it important to state the principle that nude persons have a right to control their public face, just as clothed people do. In this, the law only tracks German sensibilities more broadly, and in particular the German etiquette of public nudity. Indeed, any serious scholar's research into continental privacy norms should include a good stint on a German *Liegewiese*. As any German there will tell you, it is a matter of ordinary politeness that nude people have a right not to be stared at. Taking off all your clothes, even in a public park, does not constitute a surrender of your privacy.

Such is the sort of attitude that we must grasp if we want to understand continental law: We must understand that there could be such a thing as private public nudity. It is an attitude that American law simply does not comprehend, as we can see most strikingly from the Supreme Court's 1995

235. For a sensitive comparative discussion of the German and American law of public nudity, see Mathias Reimann, *Prurient Interest and Human Dignity: Pornography Regulation in West Germany and the United States*, 21 U. MICH. J.L. REFORM 201, 232-41 (1987). I have suggested elsewhere that American law tends to emphasize decency norms over civility norms. Whitman, *supra* note 42, at 1380-81 & n.343. The law of public nudity raises a number of issues that I cannot deal with in depth in this Article.

236. *See* BERTRAND, *supra* note 10, at 160-61.

237. § 23, para. 2 KUG (amended 2001); *see also* SOEHRING, *supra* note 79, at 445.

238. *Bildveröffentlichung eines nackten Sonnenbaders*, 1986 ARCHIV FÜR PRESSERECHT 69, 70.

239. *See id.*

decision in *Vernonia School District 47J v. Acton*.[240] This was a case that presented the question of whether high school athletes could be subjected to mandatory drug testing. In holding that they could, the Supreme Court offered, among others, an argument that took the following form: Athletes regularly shower together in the nude. Since they voluntarily expose themselves through this "communal undress," they have a "reduced expectation of privacy" with regard to whether their urine will be tested for the presence of drugs: Once a person appears nude in public—even before a highly restricted public—he has, in the eyes of the Court, at least partly surrendered his claim to privacy.[241] To the continental ear, this is a bizarre non sequitur. The fact that students have willingly appeared naked in one circumstance says strictly nothing about whether they have broadly surrendered their right to control access to data about them, and certainly nothing about whether they have consented to a urine test.[242] For Americans, by contrast, the right to privacy is, at its metaphoric core, a right to hide behind the walls of one's own home. Those who have abandoned the protection of the home, and a fortiori the protection of clothing, have at best a diminished claim to privacy.

VIII. WARREN AND BRANDEIS REVISITED

Indeed, continental ideas of privacy are just not much at home in American legal culture. To be sure, there is certainly American law on the books that sounds something like what we find on the books of Germany or France. American law has its famous four forms of the privacy tort, as analyzed by William Prosser in 1960: intrusion upon seclusion,[243] appropriation of the name or likeness of another,[244] public disclosure of private facts "not of legitimate concern to the public,"[245] and disclosure of private facts in such a way as to portray victims in a "false light."[246] There is considerable legislation too, like the Video Privacy Protection Act of 1987,[247] passed in reaction to journalistic investigations of Robert Bork, and various other acts and bills, both state and federal. American legislatures do pass privacy protection statutes of various kinds[248]—especially, as Jeffrey

240. 515 U.S. 646 (1995).

241. *Id.* at 657. *But see* Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls, 536 U.S. 822, 846-47 (2002) (finding that "communal undress" was not essential to the *Vernonia* holding).

242. For applications of this rule, see SOEHRING, *supra* note 79, at 450-52.

243. RESTATEMENT (SECOND) OF TORTS § 652B (1977).

244. *Id.* § 652C.

245. *Id.* § 652D.

246. *Id.* § 652E.

247. 18 U.S.C. § 2710 (2000).

248. For a survey, see ROBERT ELLIS SMITH, COMPILATION OF STATE AND FEDERAL PRIVACY LAWS (2002).

Rosen has observed, in the wake of "heartstring-tugging" scandals.[249] While many of these statutes treat the government as the principal threat to privacy, not all of them do. Though less than a third of the states have general laws on the protection of privacy, there certainly are state protections.[250] There are even state constitutional protections for privacy.[251] There are decisions giving protection to one's image—notably cases involving the nude or sexually charged images of young women who did not intentionally pose in a provocative way,[252] or who are the victims of sexual assaults,[253] or who otherwise seem to be living "a life of rectitude."[254] There are cases involving nongovernmental invasions of the "privacy of [the] home,"[255] and especially of the privacy of the bedroom:[256] Where the walls of the home are breached Americans can be sensitive. There is a lot of American scholarship that vigorously defends the European point of view.[257] And of course, there is the famous article of Warren and Brandeis.

Nevertheless, as our many and heated conflicts with Europe suggest, the American attitude remains different. It is not true that American law is *absolutely* different from European law. No generalization about any legal system is ever absolutely correct: Law is always something of a jumble, and there are always exceptions to any general description. The differences that we can see are always comparative differences, not absolute ones. Nevertheless, the American climate of values remains basically inhospitable to the European way of looking at things. We do find patches of more or less continental law in America, just as patches of snow sometimes survive in a hollow on an early spring day. But over time, most efforts to make American law look more continental tend to melt away.

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249. ROSEN, *supra* note 46, at 170. For an example, see the California Privacy Protection Act, CAL. CIV. CODE § 1708.8 (West Supp. 1999), which was passed in the wake of the death of Princess Diana.

250. SOLOVE & ROTENBERG, *supra* note 24, at 25.

251. *E.g.*, ALA. CONST. art. I, § 22; CAL. CONST. art. I, § 1; FLA. CONST. art. I, § 23.

252. *E.g.*, Wood v. Hustler Magazine, 736 F.2d 1084 (5th Cir. 1984); Lake v. Wal-Mart Stores, Inc., 582 N.W.2d 231 (Minn. 1998) (discussing the circulation of photos that gave the false impression that the plaintiff was a lesbian). Women are not the only ones for whom American law shows this kind of concern. For a recent example involving a man, see Solano v. Playgirl, 292 F.3d 1078 (9th Cir.), *cert. denied*, 537 U.S. 1029 (2002).

253. *See* SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES 375-86 (7th ed. 2001) (surveying evidentiary shield laws); *see also* N.Y. CIV. RIGHTS LAW § 50-b (McKinney 1992); 42 PA. CONS. STAT. § 5988 (2002).

254. Melvin v. Reid, 297 P. 91, 93 (Cal. Dist. Ct. App. 1931).

255. Rhodes v. Graham, 37 S.W.2d 46, 47 (Ky. 1931), *quoted in* RICHARD C. TURKINGTON & ANITA L. ALLEN, PRIVACY LAW: CASES AND MATERIALS 538 (2d ed. 2002).

256. Hamberger v. Eastman, 206 A.2d 239 (N.H. 1964). This case is a chestnut in the American privacy literature. *See, e.g.*, POST, *supra* note 68, at 52-53; TURKINGTON & ALLEN, *supra* note 255, at 539-40.

257. *See supra* notes 64-69 and accompanying text.

This is indeed how we should understand the fate of "that most influential law review article of all,"[258] Warren and Brandeis's *The Right to Privacy*.[259] Warren and Brandeis undertook the seminal, and still most cited, effort to introduce a continental-style right of privacy into American law. In theory, their right is still part of the law almost everywhere in America. Nevertheless, it is generally conceded that, after a century of legal history, it amounts to little in American practice today.[260] The story of the relative failure of Warren and Brandeis is precisely a study in how poorly continental ideas do in the American climate.

In fact, it is best to think of the Warren and Brandeis tort not as a great American innovation, but as an unsuccessful continental transplant. For, though commentators have failed to recognize it, what the two authors set out to do was precisely to introduce the continental protection of privacy into America. It is hardly news that Warren and Brandeis worked in a world of Boston respectability closely akin to the high society of late-nineteenth-century Europe. Warren was a Boston Brahmin, a child of one of the socially dominant families of the city. Brandeis was the son of Bohemian-Jewish immigrants who had fled to America after 1848.[261] Their article was written in a fit of outrage over newspaper reports of a party given by the Warrens,[262] and its main target was the gossip pages of the "yellow press," which Warren and Brandeis were convinced represented a new phenomenon.[263] Like a number of authors of the period,[264] they were upset

258. Kalven, *supra* note 209, at 327.

259. Warren & Brandeis, *supra* note 69.

260. Rodney A. Smolla, *Privacy and the First Amendment Right To Gather News*, 67 GEO. WASH. L. REV. 1097, 1101 (1999); Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291, 333-34, 340 (1983).

261. ALLON GAL, BRANDEIS OF BOSTON 1-5 (1980).

262. There has been some confusion about this, but the basic story remains the same. *See* James H. Barron, *Warren and Brandeis,* The Right to Privacy, *4 Harv. L. Rev. 193 (1890): Demystifying a Landmark Citation*, 13 SUFFOLK U. L. REV. 875, 891-94 (1979); Zimmerman, *supra* note 260, at 295-96.

263. This was not true: Society reporting had been standard newspaper fare since the seventeenth century. Indeed, newspaper reporting in some ways *began* as society reporting. *See, e.g.*, 11 LAROUSSE'S GRAND DICTIONNAIRE UNIVERSEL DU XIXE SIÈCLE 63 (Paris, Administration du Grand Dictionnaire Universel 1874) (describing the aims of the *Mercure de France*, a newspaper founded in 1672 that was concerned in part with details of marriages and the like). What was true was that newspapers in the age of Warren and Brandeis, unlike newspapers of the seventeenth or eighteenth centuries, had a mass audience, so that society reporting could now be read, not only by society readers, but by people in all walks of life.

264. The most frequently cited are THOMAS M. COOLEY, LAW OF TORTS 29 (Chicago, Callaghan 2d ed. 1888) (1878); E.L. Godkin, *The Right to Privacy*, THE NATION, Dec. 25, 1890, at 496; and E.L. Godkin, *The Rights of the Citizen: IV—To His Own Reputation*, SCRIBNER'S MAG., July 1890, at 58 [hereinafter Godkin, *To His Own Reputation*]. When Joseph Kohler denounced the American "right of privacy" in 1903, though, he cited none of these works. Instead, he cited Elbridge Adams and Percy Edwards. KOHLER, *supra* note 42, at 7 n.1 (citing Elbridge L. Adams, *The Law of Privacy*, 175 N. AM. REV. 361 (1902); and Percy L. Edwards, *Right of Privacy and Equity Relief*, 55 CENT. L.J. 123 (1902)).

by these press intrusions. "The press," the coauthors complained, "is overstepping in every direction the obvious bounds of propriety and of decency. . . . To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle."[265] The only answer to the challenge, they argued, was to insist on a "right to privacy." This would protect individuals not only against the press, but also against intrusive photographers and the like. Nor would the new right be confined to high-status people like the Warrens:

> The design of the law must be to protect those persons with whose affairs the community has no legitimate concern, from being dragged into an undesirable and undesired publicity and to protect all persons, *whatsoever*[] *their position or station*, from having matters which they may properly prefer to keep private, made public against their will.[266]

All of this was obviously much in the continental style, up to and including its desire to level up, to guarantee the right of all citizens "whatsoever" to be safe from "undesirable and undesired publicity." The high-status tenor of the Warren and Brandeis article is indeed something any reader can see immediately, and critics of Warren and Brandeis have said so.[267] But if we look closely at the article we can see something else: We can see that Warren and Brandeis took continental law as their starting point.

In fact, it is not difficult to retrace the research steps that Warren and Brandeis took. Like the authors of any law review article, they looked for authority for their position. The first and most natural place to look for their right to privacy, the two authors strikingly observed, lay in the protection of "honor" through the law of insult. And in the law of insult, they rightly noted, there were already lively traditions to draw upon in both France and Germany by the end of the nineteenth century. As we have seen,[268] by 1890, when Warren and Brandeis wrote, the right to privacy was a longstanding topic of study and discussion within the continental traditions of the law of insult. Indeed, continental discussions were reaching a fever point in the 1880s. Warren and Brandeis were perfectly familiar with this. They cited the French privacy legislation of 1868 at length, and admiringly.[269] They also cited German scholarship on the law of insult—in

265. Warren & Brandeis, *supra* note 69, at 196.

266. *Id.* at 214-15 (emphasis added); *see also* Elbridge L. Adams, *The Right of Privacy, and Its Relation to the Law of Libel*, 39 AM. L. REV. 37 (1905).

267. *See* DON R. PEMBER, PRIVACY AND THE PRESS: THE LAW, THE MASS MEDIA, AND THE FIRST AMENDMENT 33-42 (1972); SOLOVE & ROTENBERG, *supra* note 24, at 18.

268. *See supra* Parts IV-V.

269. Warren & Brandeis, *supra* note 69, at 214 n.1, 216 n.1, 218 n.2.

particular Carl Salkowski's standard *Institutes and History of Roman Private Law*,[270] a very German text, which interpreted ancient Roman law through the lens of German philosophy:

> Iniuria in the narrower sense is every intentional and illegal violation of honour, *i.e.*, the whole personality of another. . . . This may be committed by insulting oral or written words or signs (so-called verbal and symbolic injuries), by deeds (so-called real injuries), by slander, and speeches and acts which cast suspicion upon, or are prejudicial to, the social or pecuniary position of any one, or other acts interfering with the right of personality.[271]

From Salkowski, or from some other German source, Warren and Brandeis borrowed the term "personality," and they characterized their right to privacy, in orthodox German fashion, as one aspect of the protection of "personality" more broadly. Indeed, it is likely that Warren and Brandeis knew more about the continental tradition than they chose to cite. Brandeis, who had been brought up in a Germanophile Louisville household, had been sent to high school in Germany during the 1870s, and he remained a passionate admirer of German culture.[272] It seems wholly improbable that he did not know of the lively German literature on "personality" when he adopted the term for his article. (If he only cited Salkowski it may be because Salkowski's was the only German text that had been translated into English.) Moreover, at least some of the French cases on the right to one's image must have been known to educated Bostonians. The *Dumas* case in particular had been an international cause célèbre.[273] In any case, French privacy protections had been publicized by E.L. Godkin, an author often identified as an influence on Warren and Brandeis.[274] As Godkin had explained, "In France a man can legally prevent or punish the mere mention of his name in any disagreeable connection, if he be not in political, literary or artistic life"—law that Godkin insightfully credited to a French "sensitiveness to ridicule or insult which has probably never existed in any Anglo-Saxon country."[275]

Nevertheless, though Warren and Brandeis certainly knew the continental traditions, and cited them, they did not claim that it was possible to introduce continental practices directly into American law. They understood the continental tradition too well for that. The continental

270. *Id.* at 198 n.1.

271. CARL SALKOWSKI, INSTITUTES AND HISTORY OF ROMAN PRIVATE LAW 668-69 (E.E. Whitfield ed. & trans., London, Stevens and Haynes 1886).

272. *See* GAL, *supra* note 261, at 4-5.

273. MANKOWITZ, *supra* note 105, at 177-78.

274. *See, e.g.*, Dorothy J. Glancy, *The Invention of the Right to Privacy*, 21 ARIZ. L. REV. 1, 2-3 (1979).

275. Godkin, *To His Own Reputation*, *supra* note 264, at 67.

approach, they observed, was not available within the common law tradition—for the simple and insurmountable reason that the law of insult, and the protection of "personal honor," did not exist in America. "[O]ur system, unlike the Roman law, does not afford a remedy . . . for mental suffering which results from . . . contumely and insult [involving] an intentional and unwarranted violation of the 'honor' of another."[276] No matter how vigorous and appealing the ideas of Royer-Collard, Jhering, Gareis, Beaussire, and the rest might be, they could not be fitted into the common law precedents, which simply said nothing about personal honor, or at least nothing useful.

Warren and Brandeis's article thus started from the admission that the United States was doomed to be a nation without continental-style "privacy" protections, at least in their full form. But it continued by insisting that this was no cause for despair: Even in the absence of a law of insult, there were other resources to which one could turn. Indeed, Warren and Brandeis maintained, the protection of "honor" was not as promising a vehicle for the protection of "privacy" as continental writers imagined. The apparent analogy between honor and privacy was merely "superficial." Another road would have to be taken:

> It is not however necessary, in order to sustain the view that the common law recognizes and upholds a principle applicable to cases of invasion of privacy, to invoke the analogy, which is but superficial, to injuries sustained, either by an attack upon reputation or by what the civilians called a violation of honor; for the legal doctrines relating to infractions of what is ordinarily termed the common-law right to intellectual and artistic property are, it is believed, but instances and applications of a general right to privacy, which properly understood afford a remedy for the evils under consideration.[277]

There was no ultimate need for "honor" in order to protect privacy; artists' rights would do. But even here, of course, Warren and Brandeis were pursuing a continental tack, and most particularly a German one. The Germans, as we have seen,[278] had created *their* law of personality by drawing both on the law of insult and on *Urheberrecht*, on intellectual and artistic property. This is exactly what Warren and Brandeis, like Gareis and Kohler before them, did as well.

The resulting article is, of course, a common law classic, a tour de force effort to capture the drift of a case law system in a state of productive flux. Yet let us note that, even in their account of common law evolution, Warren

276. Warren & Brandeis, *supra* note 69, at 198.
277. *Id.*
278. *See supra* notes 146-150 and accompanying text.

and Brandeis did not sound all that different from their continental, and especially German, predecessors. As we have seen, French and German writers held that privacy had emerged as a limitation on property,[279] and an evolutionary outgrowth of the growing sensitivity to the needs of "personality."[280] Warren and Brandeis echoed these ideas. In a style unmistakably like that of Jhering, they tried to trace the evolving "spirit" of the law. Copyright, rights in "intellectual and artistic property," they observed, had always been understood as a *property* right.[281] Yet primitive ideas of property were falling by the wayside as the common law evolved. It was a general evolutionary trend of the common law to get beyond the protection of mere material "property rights," offering new protections for the immaterial damage of emotional and moral harms.[282] This was true of privacy as well. Cases that had been interpreted as property cases, as cases in copyright, in fact revealed a growing judicial sense that it was necessary to "protect the privacy of the individual" from invasion—not just from the literal invasion of one's property, but from metaphorical invasions "either by the too enterprising press, the photographer, or the possessor of any other modern device for rewording or reproducing scenes or sounds."[283] At the same time the common law of torts had gradually come to cognize the harm in various forms of mental suffering.[284] These two trends conduced to the same evolutionary end: Common law thinking was giving rise to the new "Warren and Brandeis tort," the tort of invasion of privacy.

All of this made for an inspired contribution to the international literature on the protection of privacy—one that Europeans themselves still cite.[285] But what Warren and Brandeis could not do was bring the European structure of values to the United States. Indeed, it was not just the continental law of insult that Warren and Brandeis were unable to introduce into America. It was much more broadly the constellation of ideas about personal honor that undergirded it.

The history of the cold reception that American law has given Warren and Brandeis has been written many times, and I will not repeat it here. I want only to emphasize that the American resistance to Warren and Brandeis has always been a resistance founded on two values in particular: the value of the free press, and the value of the free market. These are of course the very values that continental advocates of continental-style, honor-oriented privacy rights have long regarded with the greatest suspicion.

279. *See supra* notes 106-113 and accompanying text.
280. *See supra* Part V.
281. Warren & Brandeis, *supra* note 69, at 200-05.
282. *Id.* at 198-207.
283. *Id.* at 206.
284. *Id.* at 193-95.
285. *E.g.*, Badinter, *supra* note 174, para. 3; Beignier, *supra* note 10, at 141.

Freedom of expression has been the most deadly enemy of continental-style privacy in America. To cite once again our German scholar of 1959, the conflict has always been one between the values of Jefferson and the values of Goethe.[286] Of all American liberty values, freedom of the press is the most poisonous for continental-style privacy rights. Starting with the famous *Sidis* case of 1940,[287] American law began, in an American way, to favor the interests of the press at the cost of almost any claim to privacy. Perhaps the most striking examples come from the Supreme Court, with its decisions in *Cox Broadcasting Corp. v. Cohn*[288] and *Florida Star v. B.J.F.*[289] These were cases in which the media published the names of rape victims—in the latter case despite the fact that dissemination of the victim's name was a crime under state law. In both cases the Supreme Court found that the First Amendment protected media outlets against suit.[290] Freedom of expression just about always wins in America—both in privacy cases and in cases involving infliction of emotional distress, like *Hustler Magazine, Inc. v. Falwell*, which denied recovery to preacher Jerry Falwell after Hustler published a particularly gross parody.[291] This is the kind of question on which continental law, with its focus on personal honor, comes out differently.[292]

That does not mean, of course, that American law never protects the control of one's image. But even where it does, it tends to do it in an American way. This is perhaps clearest in the doctrine of the "right of publicity." The "right of publicity" is a characteristic American doctrinal invention, which we owe to Melville Nimmer's work of the 1950s.[293] In a sense, it is a doctrine of the protection of one's image. Nimmer argued that persons had an ownership right in their image, and that they could sue others who had misappropriated it. But it should be obvious that the notion of one's image as a piece of property, as a commercial commodity, is different in spirit from the continental protection of image. And indeed, while continental lawyers endorse this American innovation, they are

286. *See supra* text accompanying note 216.

287. Sidis v. F-R Publ'g Corp., 113 F.2d 806 (2d Cir. 1940).

288. 420 U.S. 469 (1975).

289. 491 U.S. 524 (1989); *see also* Bartnicki v. Vopper, 532 U.S. 514 (2001) (dealing with an intercepted cell phone conversation).

290. *See also* Time, Inc. v. Hill, 385 U.S. 374 (1967) (protecting the press against a "false light" privacy suit).

291. 485 U.S. 46 (1988).

292. *See* EBERLE, *supra* note 42, at 207-08 (discussing The Strauss Political Satire Case, BVerfGE 75, 369 (F.R.G.)).

293. Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203 (1954) (drawing on the opinion of Judge Jerome Frank in *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir. 1953)).

careful to distinguish it from their own distinctive traditions.[294] (Indeed, Americans themselves are confused by the question of whether the right of publicity really belongs within the realm of privacy protections or not.)[295] And unsurprisingly, the American doctrine produces different results from continental doctrine. As critics complain, the "right of publicity" has tended to lose all of its moorings in the Warren and Brandeis idea of privacy, becoming essentially a vehicle for protecting the enterprises of celebrities like Bette Midler and Vanna White.[296] Moreover, nothing in the doctrine of the "right of publicity" prevents Americans from alienating the rights in their image, no matter how humiliating their subsequent use may be. If your image is your property, you can sell it. In Europe, by contrast, as we have seen, sales of your nude image remain voidable[297]—a very important doctrine, in particular, for protecting the interests of persons who, in moments of youthful folly, have allowed themselves to be photographed in embarrassing positions.

Finally, an American interest in one's "publicity" is an interest in one's *property*, not an interest in one's honor. This too sets the American tradition apart from the continental, and it affects the analysis in such famous matters as the "Here's Johnny!" case. In that case, the entertainer Johnny Carson sued a portable toilet maker who had adopted the well-known tagline "Here's Johnny!" for its product. An appellate court held that Carson's publicity rights had been violated. But it was careful to insist that Carson's rights were commercial rights only, not privacy rights against humiliation or embarrassment.[298] Here again, we can see a contrast with continental law, and with German law in particular. Even commercial enterprises can be "insulted" in Germany. German firms have "personality" rights, and they are indeed protected against embarrassing or humiliating uses of their slogans or logos, through what is called the doctrine of *Markenverunglimpfung*.[299] Some cases litigated under the American "right

294. *See, e.g.*, BERTRAND, *supra* note 10, at 137-38. For French struggles over this, see also Elisabeth Logeais & Jean-Baptiste Schroeder, *The French Right of Image: An Ambiguous Concept Protecting the Human Persona*, 18 LOY. L.A. ENT. L. REV. 511 (1998).

295. For discussion with further references, see SOLOVE & ROTENBERG, *supra* note 24, at 162-63.

296. *See* White v. Samsung Elecs. Am., Inc., 989 F.2d 1512 (9th Cir. 1993); Midler v. Ford Motor Co., 849 F.2d 460 (9th Cir. 1988). For a more developed recitation of this complaint, see Jonathan Kahn, *Bringing Dignity Back to Light: Publicity Rights and the Eclipse of the Tort of Appropriation of Identity*, 17 CARDOZO ARTS & ENT. L.J. 213 (1999).

297. *See* BERTRAND, *supra* note 10, at 163 (discussing Pamela Anderson Lee, along with directions to a relevant Internet site); *see also supra* notes 219-233 and accompanying text.

298. Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831, 834-35 (6th Cir. 1983); *see also* Finger v. Omni Publ'ns Int'l, Ltd., 566 N.E.2d 141 (N.Y. 1990).

299. See the case known as *Markenverunglimpfung I*, BGHZ 125, 91 (98), http://www.adicor.de/urteile.nsf/0/f71f118710a2d257c125687a002f3f0e?OpenDocument. French law is more relaxed on this issue. *See* de Lamberterie & Strubel, *supra* note 44, at 343-44. There is of course also an American law of product disparagement, but its focus is characteristically more on proof of damages. *See* 50 AM. JUR. 2D *Libel and Slander* § 551 (2002).

of publicity" may come out the same way that they would in European "right to one's image" cases. But the underlying values are different, and courts feel obliged to say as much.

Indeed, even if some cases come out the same way, many come out differently. And there are many areas of the law, as we have seen, where Americans do not even perceive the sorts of privacy violations that seem to Europeans obviously present. The Europeans are right. At the end of the day, Americans do not really grasp the European idea of the protection of privacy.

IX. THE AMERICAN TRADITION: PROTECTING THE SANCTITY OF THE HOME

But does this mean that Americans don't understand the moral imperative of privacy in the creation of "personhood"? Such is the conclusion that commentators repeatedly draw, both in Europe and in the United States. Yet I hope it is clear that the problem is more complex than that. If Europeans protect "privacy," it is not because they understand universal moral truths that Americans fail to understand. It is because they live in societies that have been shaped by certain kinds of cultural expectations and certain kinds of egalitarian ideals. After many generations of experience, Europeans have come to value a certain kind of personhood: a kind of personhood founded in the commitment to a society in which every person, of every social station, has the right to put on a respectable public face; a society in which privacy rights are not just for royalty, but for *everybody*. This is a concept of personhood that has been formed by the peculiarities of continental culture and continental history, and it has produced a law of privacy that has been formed by the same culture and history. For persons who live in these continental cultures, there will always be some practices that seem, in an intuitively obvious way, to represent violations of privacy. Yet the same practices may not seem like violations at all to non-Europeans.

As for Americans: They have their own concepts of personhood, their own traditions, and their own values. And the consequence is that there will always be practices that intuitively seem to represent obvious violations to Americans. Most especially, state action will raise American hackles much more often than European ones.

This is indeed almost too obvious to need describing for American readers. Suspicion of the state has always stood at the foundation of American privacy thinking, and American scholarly writing and court doctrine continue to take it for granted that the state is the prime enemy of our privacy. To Americans, the starting point for the understanding of the right to privacy is of course to be sought in the late eighteenth century, and

especially in the Bill of Rights, with its vigorous circumscription of state power. In particular, "privacy" begins with the Fourth Amendment: At its origin, the right to privacy is the right against unlawful searches and seizures. It is thus a right that inheres in us as free and sovereign political actors, masters in our own houses, which the state is ordinarily forbidden to invade. Over time, to the American mind, the early republican commitment to "privacy" has matured into a much more far-reaching right against state intrusion into our lives.

The classic statement of this American view came in 1886, at the same time that European scholars were developing their own characteristic ideas of privacy protections. The case was *Boyd v. United States*.[300] In forbidding the government to seize the documents of a merchant in a customs case, the Supreme Court, after discussing the eighteenth-century background at length, issued an aggressive declaration of the "sanctity" of an American home. The court focused on a cause célèbre of the eighteenth century: the case of John Wilkes, the British political dissenter whose papers had been seized by government agents.[301] In 1762, Lord Camden had condemned such seizures in terms that helped inspire the American Bill of Rights. The Court rehearsed Camden's opinion—"a monument," as the Court put it[302]—and then continued:

> The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employés of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offence . . . . Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation of that judgment.[303]

In later generations, the Supreme Court retreated from its uncompromising stance on the particular issue in *Boyd*, the government's

300. 116 U.S. 616 (1886).
301. *Id.* at 625-26.
302. *Id.* at 626.
303. *Id.* at 630.

access to papers.[304] Nevertheless, *Boyd*'s fundamental understanding of "privacy" rights as generalizations of the principle of the "sanctity of the home" has survived. Indeed, the standard history of modern American privacy rights should really begin, not with Warren and Brandeis's distant and dim echo of continental ideas, but with *Boyd v. United States*, four years earlier.

To be sure, American scholars and judges have repeatedly tried to graft a continental-style dignity standard on to this Fourth Amendment tradition. In the twentieth century, the most familiar attempt of this kind came from Louis Brandeis himself, by then a Supreme Court Justice, writing to dissent from a 1928 holding that wiretapping was not an invasion of privacy. Brandeis's famous dissent in that case, *Olmstead v. United States*, recast his 1890 "right to privacy" in a typically American way, as a Fourth Amendment matter.[305] This dissent is cited often and enthusiastically by privacy advocates, but what is most remarkable about it is the way in which it lumped two distinct concepts of privacy together—only one of which had a clear basis in constitutional authority:

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, *as against the Government*, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.[306]

The "pursuit of happiness," if it need be said, is of course not a phrase from the Constitution.[307] What Brandeis was able to identify was a core constitutional right against the state, which he tried—nobly, if you will—to extend well beyond its original circumstances. Later Fourth Amendment jurisprudence took the same tack—for example in *Schmerber v. California*, which described the Fourth Amendment as protecting "privacy *and dignity* against unwarranted intrusion by the State."[308] Here again, though, the

304. *See* Fisher v. United States, 425 U.S. 391 (1976); Couch v. United States, 409 U.S. 322 (1973); Warden v. Hayden, 387 U.S. 294 (1967).

305. 277 U.S. 438, 471-85 (1928) (Brandeis, J., dissenting), *overruled by* Katz v. United States, 389 U.S. 347 (1967), *and* Berger v. New York, 388 U.S. 41 (1967).

306. *Id.* at 478 (emphasis added).

307. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

308. 384 U.S. 757, 767 (1966) (emphasis added).

reasoning was most emphatically about the state, with no discernible doctrinal content given to the "dignity" interest.

That tradition has now continued with *Lawrence v. Texas*, the Supreme Court's striking 2002 Term opinion on homosexuality: "Liberty," the *Lawrence* opinion begins, "protects the person from unwarranted government intrusions into a dwelling or other private places."[309] This is familiar, indeed well-worn, American language, but it is not the only language that the decision speaks. It also speaks the language of dignity: *Lawrence* insists movingly on the right of gays not to be "demeaned," on their right to enjoy respect.[310] But once again, as has so long been the case, the *Lawrence* Court finds no doctrinal hook on which to hang its talk of "respect." There is *language* about respect in *Lawrence*, but there is little that can be said to count in any certain way as law. One wonders indeed whether "respect," as discussed by the Court in *Lawrence*, really has much future in American law. One hopes that it does. There *is* some authority that insists on privacy protections for sexual orientation as an "intimate aspect of . . . personality."[311] In other circumstances, too, dignity sometimes seems to play an authentically important role in the application of Fourth Amendment norms.[312] History suggests, though, that such arguments will fade in American discourse with time. This makes the prospects for a constitutionalized right to gay marriage, for example, dim.

What matters in America, over the long run, is liberty against the state within the privacy of one's home. This does not mean that the American approach to "privacy" is narrowly limited to Fourth Amendment search and seizure problems, of course. Lawyers do ingenious things, and the conception of privacy as liberty within the sanctity of the home can be extended in important ways. This has been notably true, of course, in the famous series of "constitutional privacy" decisions that began with *Griswold v. Connecticut*.[313] At the limit, for those who accept the reasoning in *Roe v. Wade*, the modern right to "privacy" is the right to keep the government from intervening in our "private" decision about whether or not to abort an unwanted fetus; just as for others it is the right to keep the government from taking away our firearms. When private actors breach the walls of our homes, they too may sometimes raise our legal hackles—like the much-cited New Hampshire landlord of *Hamberger v. Eastman*, who bugged his tenants' bedroom.[314]

309. 123 S. Ct. 2472, 2475 (2003).

310. *Id.* at 2482.

311. Sterling v. Borough of Minersville, 232 F.3d 190, 196 (3d Cir. 2000).

312. *E.g.*, Lauro v. Charles, 219 F.3d 202 (2d Cir. 2000) (holding that "perp walks" violate a dignity interest when not sufficiently related to a legitimate government objective).

313. 381 U.S. 479 (1965).

314. 206 A.2d 239 (N.H. 1964).

Nevertheless, the fundamental limit on American thinking always remains: American "privacy" law, however ingenious its elaborations, always tends to imagine the home as the primary defense, and the state as the primary enemy. This gives American privacy law a distinctive coloration. Where American law perceives a threat to privacy, it is typically precisely because the state has become involved in the transaction. The case of *Hanlon v. Berger*—also commonly known as "the CNN case"—makes a fine example.[315] As we saw before, the Supreme Court found no violation of privacy rights when, in the *Florida Star* case, a newspaper published the name of a rape victim. The result was different in *Hanlon*: There the Court found a violation of privacy where a TV news crew went on a "ride-along" during a police raid. Once the police come into it, American intuitions shift. Another important example is *Whalen v. Roe*, the leading American informational privacy case.[316] Predictably, that was a case involving government collection of private information. In general, the really easy cases in the American tradition are the ones involving, or resembling, criminal investigations.[317] You can count on Americans to see privacy violations once the state gets into the act—in particular, where the issue can be somehow analogized to penetration into the home, or sometimes the body.[318] Otherwise, you can never be sure. But you *can* count on Americans

315. 526 U.S. 808 (1999); *see also* Wilson v. Layne, 526 U.S. 603 (1999) (*Hanlon*'s companion case); Oziel v. Superior Court, 273 Cal. Rptr. 196, 207 (Ct. App. 1990); ROSEN, *supra* note 46, at 42-43 (discussing these cases).

316. 429 U.S. 589 (1977). It is not clear how far the "right" established even in this case reaches. *See* Am. Fed'n of Gov't Employees v. Dep't of Hous. & Urban Dev., 118 F.3d 786 (D.C. Cir. 1997).

317. *See* Ferguson v. City of Charleston, 532 U.S. 67 (2001) (holding that drug testing is an invasion of privacy where state law enforcement is involved).

318. This is true despite the famous pronouncement in *Katz v. United States* that the Fourth Amendment "protects people, not places." 389 U.S. 347, 351 (1967). For the requirement of a "physical invasion," see *Silverman v. United States*, 365 U.S. 505 (1961). For the special place of the home, see *Payton v. New York*, 445 U.S. 573 (1980). For a famous obscenity case hinging on the penetration of the home, see *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). *But see* Shulman v. Group W Prods., Inc., 955 P.2d 469, 490 (Cal. 1998) (finding no violation where an accident victim was filmed and recorded at the scene, but a possible violation where a metaphorical or literal "zone of physical or sensory privacy" was invaded). As the *Restatement* puts it,

> The defendant is subject to liability under the rule stated in this Section only when he has intruded into a private place, or has otherwise invaded a private seclusion that the plaintiff has thrown about his person or affairs. Thus there is no liability for the examination of a public record concerning the plaintiff, or of documents that the plaintiff is required to keep and make available for public inspection. Nor is there liability for observing him or even taking his photograph while he is walking on the public highway, since he is not then in seclusion, and his appearance is public and open to the public eye. Even in a public place, however, there may be some matters about the plaintiff, such as his underwear or lack of it, that are not exhibited to the public gaze; and there may still be invasion of privacy when there is intrusion upon these matters.

RESTATEMENT (SECOND) OF TORTS § 652B cmt. c (1977). Or again, consider Erwin Chemerinsky defending the constitutionality of the California Privacy Protection Act, CAL. CIV. CODE § 1708.8 (West Supp. 1999). Chemerinsky takes his basic analysis from the Fourth Amendment: "Simply

to see violations once the state is involved, and that means that there will always be continental practices that seem acceptable to Europeans but objectionable to us.

This is certainly not, once again, because continental eyes perceive *no* dangers emanating from the state. There are continental protections against searches and the like, though in practice they are somewhat less extensive than American protections.[319] There are also continental decisions like the well-known German census cases, which limited access to German census data.[320] Continental observers certainly understand how to distrust the state in some cases, just as Americans certainly understand how to protect people, in some cases, from embarrassing appropriations of their image. The differences are relative, and not absolute, as always.

Nevertheless, they are real differences, and they do mean that there are always some continental practices that seem just as obviously untroubling to German or French people as they seem obviously wrong to Americans. I offered numerous examples at the beginning of this Article. For the sake of brevity, let me focus on just one before concluding: the law of names. Continental governments reserve to themselves the right to refuse to register certain given names that parents have chosen for their infants. This is done differently in different countries. In Germany, the local registry office, the *Standesamt*, maintains a list of permissible names.[321] After reforms in 1993, the state has more limited powers in France. Today, local French officials can issue a complaint if parents choose a name that those officials deem to be not in the best interests of the newborn child. A court will then be seized of the matter, and will decide if the name is an acceptable one. If it rejects the parents' choice, the court itself is to choose a name for the infant in question, if necessary.[322]

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put, the law is constitutional because it substantially advances the government's interest in safeguarding privacy in the home." Erwin Chemerinsky, *Protect the Press: A First Amendment Standard for Safeguarding Aggressive Newsgathering*, 33 U. RICH. L. REV. 1143, 1164 (2000). Not every court is willing to extend such "invasion of property" reasoning, though. *See, e.g.*, Desnick v. Am. Broad. Cos., 44 F.3d 1345 (7th Cir. 1995) (declining to extend trespass or Fourth Amendment reasoning in the case of a journalistic exposé).

For cases dealing with penetration into the body, see *Union Pacific Railway Co. v. Botsford*, 141 U.S. 250 (1891); and COOLEY, *supra* note 264, at 29.

319. *See* DAMAŠKA, *supra* note 39, at 13-14, 23-24.

320. *See* The Census Act Case, BVerfGE 65, 1; The Microcensus Case, BVerfGE 27, 1.

321. The regulations are found in section 262 of the Allgemeine Verwaltungsvorschrift zum Personenstandsgesetz (Dienstanweisung für die Standesbeamten und ihre Aufsichtsbehörden), v. 31.1.1995 (on file with author). Germans, in my experience, are well aware of this. For a popular guide to the current state of affairs, consult Namensgebung—Geburtsanzeige beim Standesamt, http://www.geburtskanal.de/Wissen/N/Namensgebung_GeburtsanzeigeStandesamt.shtml (last visited Oct. 3, 2003).

322. C. CIV. art. 57. For a survey of the history of the French law of names, see NICOLE LAPIERRE, CHANGER DE NOM (1995); and ANNE LEFEBVRE-TEILLARD, LE NOM: DROIT ET HISTOIRE (1990).

These are practices that seem strange indeed to Americans—*how can a judge name your baby?*—but they are widely defended by Europeans. Most commonly, Europeans say that the state simply must intervene to protect children against the stupidities of their parents. Indeed, to judge from my own conversations, the popular mind is vividly conscious of the problem of parental stupidity. It is a problem that is exemplified in particular, for ordinary Europeans, by the case of a French child named by her parents "Mégane Renaud." "Mégane" is the French version of the American name "Megan," one of a number of American names that became popular in France in the 1980s and 1990s.[323] "Mégane" is however also the name of a popular car model marketed by the French manufacturer Renault (pronounced in the same way as "Renaud"). Thus two bits of French popular culture came together in an unfortunate way when parents with the surname "Renaud" chose to call their newborn daughter "Mégane." Local officials made a highly publicized (though ultimately unsuccessful) intervention, apparently believing that it was too much to saddle a child with a name something like the equivalent of "Camry Toyota."[324] There are other recent cases, too, in which parents have been prevented from giving their children names that are "ridiculous, pejorative, or in bad taste."[325] One Belgian woman, for example, was recently forbidden to name her newborn "Anakin," after the character in the Star Wars movie series. Despite her threat to go on a hunger strike, officials decreed that her child was to be called "Dorian."[326] There is even European human rights law on the issue. The case in question involved a French couple that chose to name their child "Fleur de Marie" ("Mary's Flower"), a name rejected by local officials on the ground that it was not a proper saint's name. That decision was litigated all the way to the European Court of Human Rights, which held, in 1996, with a Canadian judge dissenting, that the law of names did not represent a cognizable violation of the right of privacy.[327]

323. For two leading examples, see Résultats statistiques: Le graphique ci-dessous indique le nombre annuel de bébés français qui ont reçu le prénom JENNIFER, *at* http://www.meilleursprenoms.com/stats/histogram.php3?recherche=jennifer (last visited Dec. 4, 2003); and Résultats statistiques: Le graphique ci-dessous indique le nombre annuel de bébés français qui ont reçu le prénom KEVIN, *at* http://www.meilleursprenoms.com/stats/histogram.php3?recherche=kevin (last visited Dec. 4, 2003).

324. CA Rennes, 6e ch., May 4, 2000, J.C.P. 2001, IV, 2655, note Pierre & Boizard. The court's opinion emphasized that the parents had not had any "arrières-pensées"—that is, any unacknowledged or ulterior intentions, and that the car model in question would likely go out of production by the time the child reached school age.

325. For discussion and citations, see MÉGA CODE CIVIL 177 (Xavier Henry et al. eds., 5th ed. 2003) (commentary on Article 57, paragraph 3).

326. *Nach dem "Krieg der Sterne" Kampf um einen Vornamen*, FRANKFURTER ALLGEMEINE ZEITUNG, Jan. 18, 2000, at 2.

327. Guillot v. France, App. No. 22500/93 (Eur. Ct. H.R. Oct. 24, 1996), http://www.worldlii.org/int/cases/IIHRL/1996/80.html. A Belgian judge also dissented. There is of course no uniform orthodoxy on these questions in any country.

All very strange to Americans. To be sure, the law of names has been loosening up, both in France and Germany. French law has eased up noticeably since the early 1990s.[328] In the last few years, cases have been few in France—though the standard commentary to the Civil Code speculates that this may be because prelitigation interventions by officials are sufficient to discourage unacceptable names.[329] As for Germany: There, the most important challenges to the law of names came from the many resident non-Germans wishing to give their children ethnic names. The German government responded essentially by extending its list to include acceptable names for all recognized ethnic groups. These days, Germans can theoretically pick any name that comes from *some* culture, as long as it appears in the official "International Handbook of Given Names," is "according to its essence a given name" (family names cannot be used as first names), and conforms to the sex of the child.[330] This is certainly looser than the regulation of the past—though in my experience, few Germans realize how much latitude they have. At any rate, the European law of names is certainly not normally applied in a doctrinaire or draconian way. It is a complex body of law, in a state of some flux, which deserves a longer treatment than I can give it here.

Nevertheless, however complex it may be, its very existence is simply weird to Americans. Indeed, if you tried to introduce a law of names into a state like Texas, you might face an armed rebellion.[331] But does that mean that it is wrong or evil, by some universal standard, to have such a law of names? Europeans can see benefits in it—just as Americans can see benefits in extensive credit reporting. But the issue, here as in credit reporting, is not whether there are or are not identifiable benefits. The issue is whether a given privacy violation seems to fly in the face of fundamentally important social values. For Americans, the answer is very

328. This is especially true since the passage of Law No. 93-22 of Jan. 8, 1993, J.O., Jan. 9, 1993, p. 495 (amending C. CIV. art. 57), http://www.legifrance.gouv.fr/WAspad/Visu?cid=79562&indice=2&table=JORF&ligneDeb=1.

329. MÉGA CODE CIVIL, *supra* note 325, at 177 (commentary on Article 57, paragraph 3).

330. Officials are instructed to discourage applicants who seek to use irregular spellings. *See* Allgemeine Verwaltungsvorschrift zum Personenstandsgesetz, *supra* note 321. The current standard list can be found in the *Internationales Handbuch der Vornamen*, a description of which can be found at Internationales Handbuch der Vornamen, *at* http://www.vfst.de/xml/fachliteratur_produkt.html?produktid=202 (last visited Oct. 28, 2003). For the case of a woman who went too far, choosing twelve names for her child as a multicultural statement, see *Zwölf Namen sprengen den Personalausweis*, SÜDDEUTSCHE ZEITUNG, June 21-22, 2000, at 16. For an interesting Nazi-era baby-naming pamphlet, see L. LECHNER, DIE NAMENSGEBUNG (1938). It includes not only a list of good German names, but also carefully scripted naming ceremonies, featuring swastika banners, pictures of the Führer, hymns to be recited by small children, and so on.

331. To be sure, the law of names is not entirely absent from American life. *See In re* Dengler, 246 N.W.2d 758 (N.D. 1976) (declining to permit "1069" as a personal name). The differences here as elsewhere are relative and not absolute. Nevertheless, I trust my American readers will agree that the differences are real, and dramatic.

likely to be that the continental law of names does exactly that—flies in the face of important values of liberty. They may note that African Americans in particular, a historically oppressed population, express their independence partly through inventing unusual names for their children.[332] But in any case, here as elsewhere, Americans will see an unacceptable violation of privacy where the state introduces itself into any "private" decision. Indeed, if drawn to defend themselves philosophically, Americans may use exactly the same imposing language of "personhood" that Europeans use in defending *their* conceptions of privacy. Is not the name fundamental to the making of the person?

X. CONCLUSION

I will not try to answer that last question, because the correct concept of personhood is not what is at stake here. What is at stake are two different core sets of values: On the one hand, a European interest in personal dignity, threatened primarily by the mass media; on the other hand, an American interest in liberty, threatened primarily by the government. On both sides of the Atlantic, these values are founded on deeply felt sociopolitical ideals, whose histories reach back to the revolutionary era of the later eighteenth century.

These different core values do not, to say it one last time, completely dictate the shape of the law on either side of the Atlantic. The contrast, like all such contrasts, is relative and not absolute. Moreover, there is no logical inconsistency in pursuing *both* forms of privacy protection: It is perfectly possible to advocate both privacy against the state and privacy against nonstate information gatherers—to argue that protecting privacy means both safeguarding the presentation of self and inhibiting the investigative and regulatory excesses of the state. Indeed, American advocates of privacy typically do just that, denouncing the threat to "privacy" indiscriminately, as coming both from the state and from the media. There is nothing illogical in this.

Nevertheless, the emphases and sensibilities of the law on either side of the Atlantic remain stubbornly different, whatever careful philosophical logic might allow or dictate. Privacy law is not the product of logic. But neither is it the product of "experience" or of supposed "felt necessities" that are shared in all modern societies.[333] It is the product of local social anxieties and local ideals. In the United States those anxieties and ideals

332. *See* ROLAND G. FRYER, JR. & STEVEN D. LEVITT, THE CAUSES AND CONSEQUENCES OF DISTINCTIVELY BLACK NAMES 3-4 (Nat'l Bureau of Econ. Research, Working Paper No. 9938, 2003), http://papers.nber.org/papers/w9938.pdf.

333. OLIVER WENDELL HOLMES, THE COMMON LAW 1 (Mark DeWolfe Howe ed., Harvard Univ. Press 1963) (1880).

focus principally on the police and other officials, and around the ambition "to secure the blessings of liberty," while on the Continent they focus on the ambition to guarantee everyone's position in society, to guarantee everyone's "honor." This was already true in 1791, in the French Revolution of Jérôme Pétion, and it remains true today.

This is not something we will ever understand if we do not get beyond the sort of shallow intuitionism that is the stuff of most of our privacy literature. Indeed, it is a basic error to try to explain or justify *any* aspect of the law by appealing to our unmediated intuitions about what seems evil or horrible. That kind of crude intuitionist approach has been rejected by most moral philosophers—most famously by John Rawls, who insisted that good moral reasoning is founded on a "reflective equilibrium" between intuitions and rational moral theory.[334] Crude intuitionism is pretty much dead among moral philosophers, and it ought to be dead in the law too. Indeed, if anything, that sort of intuitionism is less acceptable in the law than it is in other realms of moral reasoning. In liberal Western societies, law is regarded as a weapon of last resort, to be drawn only when authentically fundamental values of society are at stake. This has a consequence that deserves to be stated over and over again: It is in the very nature of being a member of a liberal society that one must live with many things that seem horrible. If the sort of arguments mounted by privacy advocates were valid, many things indeed would be forbidden. Take only the example of adultery. One could easily offer an argument about adultery that took the same form as the arguments commonly offered in our privacy literature: Picture, one might say, your spouse having sex with someone else. Isn't it horrible? Horrible it may be, for most of us. But that does not decide the question of what the law should do about adultery. To decide that question, we must reflect on other, larger values—most particularly, on values of liberty.

The same is true of the law of privacy. We cannot simply start by asking ourselves whether privacy violations are intuitively horrible or nightmarish. The job is harder than that. We have to identify the fundamental values that are at stake in the "privacy" question as it is understood in a given society. The task is not to realize the true universal values of "privacy" in every society. The law puts more limits on us than that: The law will not work *as law* unless it seems to people to embody the basic commitments of their society. In practice, this means that the real choice, in the Atlantic world at least, is between social traditions strongly oriented toward liberty and social traditions strongly oriented toward dignity. This is a choice that goes well beyond the law of privacy: It is a choice that involves all the areas of law that touch, more or less nearly, on questions of dignity.

334. JOHN RAWLS, A THEORY OF JUSTICE 18-19 (rev. ed. 1999).

We can respond to this choice by refusing to make it: We can opt for a world in which societies just do things differently. For example, we can declare that American gays can realistically expect only to have their liberty rights protected. The prospects for the kind of dignitary protections embodied in a law of gay marriage, we could say, are remote. After all, protecting people's dignity is quite alien to the American tradition. Or we can do what most moral philosophers want to do: We can reject the notion that different societies should have differing standards. But if we take that tack, we must face the fact that we will not succeed in changing either world unless we embark on a very large-scale revaluation of legal values.

In truth, there is little reason to suppose that Americans will be persuaded to think of their world of values in a European way any time soon; American law simply does not endorse the general norm of personal dignity found in Europe. Nor is there any greater hope that Europeans will embrace the American ideal; the law of Europe does not recognize many of the antistatist concerns that Americans seem to take for granted. Of course we are all free to plead for a different kind of law—in Europe or in the United States. But pleading for privacy as such is not the way to do it. There is no such thing as privacy *as such*. The battle, if it is to be fought, will have to be fought over more fundamental values than that.

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